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To my best friend Debbie

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FOREWORD

I am pleased to be asked to write a short foreword to the Prosecutors Handbook.

This resource book fills a great need for a reference work which is required by those prosecuting in the Provincial Offences Courts. The Provincial Offences Act is relatively new and since its inception the previous handbook has been somewhat obsolete in many respects. This new, entirely updated, handbook is welcome indeed.

I commend this book to all those interested in the procedures of our Provincial Offences Courts, and extend the Ministry of the Attorney General's gratitude to Mr. Bruce Long, Crown Attorney for the County of Northumberland, for assembling the awesome amount of material the book contains, and for writing what will be a most useful reference book for our prosecutors.

Archie Campbell,
Deputy Attorney General.



PREFACE TO SECOND EDITION

After the final proofreading and with a collective sigh of relief, the first edition of the Prosecutors Handbook left this office. I expected that some reasonably lengthy period of time would pass before any revisions to it would be commenced. Suggestions for updates and additions were dutifully filed to be utilized at some time in the distant future.

However, given the rapidity of developments in the Law, it became evident that if the Prosecutors Handbook was to retain its usefulness, it must be revised as soon as practicable. Fortunately, the original team was still in place and the revision process commenced in earnest late in 1985. Again Mr. Terry Cooper assumed this task in addition to his law school studies. His superlative efforts and abilities are best demonstrated by the need to replace all of the first edition. An expected few revisions became, in his hands, a major rewrite.

My appreciation is again extended to Mrs. Carolyn Lytle and Mr. David Attley for their continued assistance. Without their willing and skilful help, this second edition would still be only in the rough handwritten stage.

Finally, this second edition does not come with any assurance that it will be updated in the immediate future. The time necessary for such projects has become increasingly rare. However, if the reader should come across some case which might profitably be included in a later revision.....

Bruce W. Long
Crown Attorney

PREFACE TO THE FIRST EDITION

In 1973 the Ontario Crown Attorneys' Association assumed the responsibility for the educational training of the Provincial Prosecutors. A Handbook for Provincial Prosecutors was prepared with the intention that it would be their primary source of reference. Many of the recipients kept their Handbooks updated and current; however, the Handbook, itself, inevitably became aged and outdated.

The task of breathing new life into it fell to me. Fortunately, a most capable assistant was also willing to accept the challenge. Mr. Terry Cooper, student-at-law, had proved to be an outstanding student in this office during the Summer of 1984 and he consented to assist in the writing of this Handbook during the Fall months. His efforts were in addition to an arduous second year law school programme. Throughout the many days, evenings and weekends, his willingness, his diligence, his contagious enthusiasm, and his conscientious attention to the many issues and details never wavered.

The time constraints in the writing of this book placed inordinate pressures on Mrs. Carolyn Lytle who typed the manuscript with accuracy and expeditiousness. Each Monday morning she faced another list of revisions and new materials which required her attention.

Mr. David Attley, Chief Administrative Officer of the Ministry of the Attorney General, received the typed volume after it left my hands. He deserves much credit for his competent guidance of the Handbook through its final stages.

As with all legal writings, the finished product may in certain areas require updating by the time it is distributed. To each of you who take the time to advise me of any suggested changes or any errors which you have noticed, may I prospectively express my appreciation.

Bruce W. Long
Crown Attorney



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ADJOURNMENTS

Introduction

The granting of an adjournment or the refusal of a request for an adjournment is within the discretion of the Court and is seldom interfered with on appeal unless the discretion was not exercised on judicial principles or a full hearing on the issue was not held.

Barrette v. The Queen (1976), 29 C.C.C. (2d) 189 (S.C.C.)

Provincial Offences Act

See Sections 32, 38, 50, 54.

Jurisdiction Loss

If the Court does not comply with the statutory provisions concerning adjournments, new process can be issued to compel the defendant to appear.

Provincial Offences Act: Section 32

Whenever a defendant appears before the proper court, even conditionally or under protest, or by agent, jurisdiction is thereby regained over his person.

Regina v. Gougeon et al. (1981), 55 C.C.C. (2d) 218 (Ont. C.A.)

Re Harnish and The Queen (1980), 49 C.C.C. (2d) 190 (N.S.C.A.)

When a matter is inadvertently adjourned to a statutory holiday, e.g., Sunday, it is to be considered as being adjourned to the following juridical day.

Re Brand and The Queen (1975), 20 C.C.C. (2d) 253 (Alta. S.C.)

Similarly when a Court adjourns a matter orally to a certain date and then inadvertently endorses an incorrect date on the Information, jurisdiction is not lost.

Regina v. Wick (1975), 20 C.C.C. (2d) 203 (Sask. Q.B.)

To Secure Counsel

Generally, a defendant is entitled to have counsel appear for a trial; however, this right is limited to counsel who is able to appear on the trial date set by the court.

Regina v. Taylor — February 11, 1980, — unreported (Ont. S.C.)

Re R and Chimienti (1980), 17 C.R. (3d) 306 (Ont. H.C.)

An adjournment of a trial may be refused for a defendant who was responsible for the failure to have counsel present, e.g., the defendant discharged his previous counsel without engaging replacement counsel.

Regina v. Harrison and Alonzo (1982), 67 C.C.C. (2d) 401 (Alta. C.A.)

Conversely, there is a duty on a counsel's part not to agree to act for a defendant when other prior commitments preclude the lawyer from acting at the trial of the defendant.

Regina v. Harrison and Alonzo (1982), 67 C.C.C. (2d) 401 (Alta. C.A.)

Although an absent counsel's action may constitute contempt, if a defendant's counsel is not present through no fault of the defendant, he should not be forced to proceed. If there is evidence to show that a defendant, for purposes of delay, arranged for, or agreed to, his counsel's absence, the defendant could be denied an adjournment and forced to proceed.

Barrette v. The Queen (1976), 29 C.C.C. (2d) 189 (S.C.C.)

If an accused has set a trial date and then is without counsel on that date, an adjournment may be denied.

Manhas v. The Queen (1980), 17 C.R. (3d) 331 (B.C.C.A.) and at 348 (S.C.C.)

Adjournments in Provincial Courts (Criminal Division)

In a notice reported at (1979), 22 O.R. (2d) Part 3, pages vi and vii, the following procedures were delineated:

Notice

Trial Dates and Adjournments in the Provincial Courts (Criminal Division)

1. Trial dates in Provincial Courts (Criminal Division)

When a date for trial has been fixed by the Provincial Court (Criminal Division) with the agreement of counsel for the Crown and for the defence, the trial will be expected to proceed on the date fixed. By consenting to the date, both counsel will be considered to have committed themselves to be present on the date fixed and to have undertaken to make no other commitments that will render their attendance impossible.

2. Subsequent Dates for Trials and Appeals

In fixing subsequent dates for trials or appeals, the Supreme, County and District, and Provincial Courts will endeavour to ensure that their respective schedules do not make it impossible for counsel to honour undertakings which they have already given in fixing a date for trial in the Provincial Court (Criminal Division). It will be the responsibility of counsel to notify the presiding judge in the Supreme, County or District, or Provincial Court of the previous commitments which counsel has made in another court which might conflict with a proposed date for trial or for an appeal.

3. Adjournments

Once a trial date has been fixed, adjournments will only be granted in exceptional circumstances, e.g., the illness of a key witness, or the illness of Crown or defence counsel occurring so near to the date of trial that it would be impossible for other counsel satisfactory to the Crown or to the accused (as the case may be) to be properly briefed. Applications for adjournments should be made as soon as the need for an adjournment is apparent so as to assist in the utilization of the court's time which has already been scheduled, in the event the adjournment is granted. Such applications must be made at least three days before the trial date so that the witnesses who have been subpoenaed can be notified that their attendance will no longer be required. The judge hearing the application will not necessarily be the judge before whom the trial is to proceed. Reasonable notice of an application for an adjournment must be given to the other parties including co-accused who are jointly charged. Appropriate arrangements will be made for such applications to be heard by the Provincial Courts (Criminal Division).

4. Default on part of Counsel

If counsel for the Crown or for the defence fails to attend on the date fixed for trial, the trial judge will require that such counsel attend before him and will have his explanation for his absence recorded. If the trial judge is not satisfied with his explanation, he will send a copy of the transcript to the Chief Judge of the Provincial Courts (Criminal Division) for forwarding to the Law Society of Upper Canada so that appropriate disciplinary proceedings can be taken.

Similarly, if counsel for the Crown or for the defence has not applied for an adjournment in accordance with paragraph 3, where one was required, then on the date for trial the trial judge will cause the explanation of counsel for such default to be recorded. If he considers the default to be serious, he will send a copy of the transcript to the Chief Judge of the Provincial Courts (Criminal Division) so that he can, in turn, forward it to the Law Society of Upper Canada for appropriate action.

AMENDMENTS OF CERTIFICATES OF OFFENCE

Introduction

The powers of amendment under the **Provincial Offences Act** are drastically wider than under the **Criminal Code**. The **Provincial Offences Act**, in broadening the jurisdiction to amend, has eliminated the technical defences which in the past resulted in the quashing of defective counts. The touchstone for all amendments is subsection one of section 37 which applies to all defects both substantive and formal and which contains a prohibition against quashing for defects unless an amendment (or particulars) would not satisfy the ends of justice. The court should be directed to the curative provisions in sections 34 to 38 when a count is found to be defective in the language used to describe an offence and should amend rather than quash it.

Provincial Offences Act

See Sections 34, 35, 36, 37, 38.

Rationale for Pleadings

The defendant must have reasonable notice of the allegation and is entitled to have a determination on the merits. However, the approach of the **Provincial Offences Act** clearly accords with the Supreme Court of Canada which in dealing with technical objections to the sufficiency of counts stated:

“the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When, as in the present case, the information recites all the facts and relates them to a definite offence identified by the relevant section of the Code, it is impossible for the accused to be misled. To hold otherwise would be to revert to the extreme technicality of the old procedure.”

Regina v. Côté (1978), 40 C.R.N.S. 308 at 313 (S.C.C.)

This theme was further elucidated when dealing with another technical matter, namely duplicity by Mr. Justice Dickson, as he then was, who stated:

“To resolve the matter one must recall, I think, the policy basis of the rule against multiplicity and duplicity. The rule developed during a period of extreme formality and technicality in the preferring of indictments and laying of informations. It grew from the humane desire of judges to alleviate the severity of the law in an age when many crimes were still classified as felonies, for which the punishment was death by the gallows. The slightest defect made an indictment a nullity. That age has passed. Parliament has made it abundantly clear in those sections of the Criminal Code having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.”

Regina v. Sault Ste. Marie (1978), 3 C.R. (3d) 30 at 38 (S.C.C.)

Time of Amendments

Section 35 of the **Provincial Offences Act** allows for amendments to be made at any time from the filing of the Certificate up to the verdict and possibly beyond.

Any objection to the form of a Certificate must be made at the trial. Appellate courts are precluded from granting relief otherwise.

Provincial Offences Act: Section 107

Prejudice to the Defendant

The court must consider the matter of prejudice to a defendant when deciding whether or not to grant a request for an amendment. To simply allege prejudice is not enough. A defendant would need to show that his defence under the original count would not be available under the amended count and his defence evidence is no longer relevant.

Rex v. Weir (No. 3) (1899), 3 C.C.C. 262 (Que. Q.B.)

Examples of Amendable Defects

A Certificate of Offence which omitted the word “issuing” from the phrase — signature of issuing provincial offences officer — was defective in form and capable of amendment. Further the presumption of regularity applied because the Certificate was signed.

Regina v. Thompson (1981), 12 M.V.R. 196 (Ont. S.C.)

A Certificate of Offence did not name the Provincial Offences Court nor the judicial district. The court office was named. This certificate was not a nullity and was amendable.

Regina v. Greenspan (August 30, 1982), (Ont. Prov. Ct.) affirmed September 16, 1982, (Ont. S.C.)

Regina v. Matsuba (1982), 17 M.V.R. 221 (Ont. H.C.)

Regina v. Keast (1982), unreported (Ont. S.C.)

Regina v. Arnold (1982), 17 M.V.R. 61 (Ont. H.C.)

Misspelled Name

It is clear that the misspelling of the defendant's name on a Certificate of Offence should not prevent the court from proceeding with a trial on the merits, so long as the error is not misleading. A useful test is — would an honest reasonable person say — “This is not me” or would he say “This is for me but you have made a mistake in my name”?

An example of such an error is ***Regina v. McGilvray*** wherein the name was spelled McGilvary on the Certificate. Mandamus was directed to the Justice of the Peace to try the matter on its merits notwithstanding the misspelling.

Regina v. McGilvray (May 1, 1981), (Ont. S.C.)

For a number of cases on this matter see *Appellation non Controlée: The Misspelling of the Defendant's Name in Informations or Certificates of Offence* by J. Douglas Ewart, (1981), 23 Criminal Law Quarterly at p. 492.

AMENDMENTS OF INFORMATIONS

Introduction

The **Provincial Offences Act** makes applicable to Informations the same principles of amendments as apply to Certificates of Offence. Therefore, see AMENDMENTS OF CERTIFICATES OF OFFENCES, loc. cit.

Provincial Offences Act:

See sections 34, 35, 36, 37, 38.

Examples of Amendable Defects

An Information under Part III of the **Provincial Offences Act** omitted the word “limited” in describing a corporate defendant. Crown had requested an amendment before plea but denied. It was held that this was an amendable defect, however, certiorari not available except for jurisdictional errors.

Re Regina and J. F. Brennan and Associates Limited (1981), 61 C.C.C. (2d) 1 (Ont. H.C.)

An Information charged the defendant that he “did operate a motor vehicle contrary to the Highway Traffic Act” rather than “did drive a motor vehicle . . .”. The Information was held to be valid and ought to have been amended and Justice of the Peace ordered to hear the case on its merits.

Regina v. West (1982), 35 O.R. (2d) 179 (Ont. H.C.)

An Information which did not name the specific Provincial Offences Court within the county or judicial district should be proceeded with.

Regina v. Frand Gordon Ferrio (October 15, 1982), unreported (Ont. S.C.)

ATTENDANCE OF DEFENDANT

Introduction

The purpose of any type of process is simply to bring the defendant before the court. Either an Offence Notice or a Summons is usually employed to secure the attendance of a defendant. Once in the courtroom the defendant is entitled to be present throughout the proceedings unless compelling reasons exist to the contrary.

Provincial Offences Act

See Sections 3, 4, 5, 6, 7, 8, 9, 51, 52, 53, 55.

Waiver of Defects in Service

Any appearance personally or by counsel in court after defective service constitutes a waiver to any defects there may have been in the service.

The Queen v. Doherty (1899), 3 C.C.C. 505 (N.S. S.C.)

Rex v. Johnson (1920), 34 C.C.C. 98 (Ont. S.C.)

Grice v. The Queen (1957), 26 C.R. 318 (Ont. S.C.)

Re Harnish and The Queen (1979), 49 C.C.C. (2d) 190 (N.S.C.A.)

Appearance at Court Office

A defendant who appears at the correct court office to enter a plea and set a trial date attorns to the jurisdiction of the court even though the Offence Notice has a defect in form.

Regina v. Callahan (1983), 21 M.V.R. 127 (Ont. H.C.)

Appearance to Attack the Process

Unless the defect relates to jurisdiction, e.g., the process was returnable in the wrong territorial area or the time for service had expired, any appearance gives the court authority to proceed with the matter. If the defendant makes a conditional appearance personally or by means of a representative who claims to act only as *amicus curiae* in order to attack some defect in the process, jurisdiction over the defendant is retained. Any appearance even under protest, in response to a defective but not jurisdictionally invalid process allows the court to consider the merits of the matter.

Grice v. The Queen (1957), 26 C.R. 318 (Ont. S.C.)

Re Harnish and The Queen (1979), 49 C.C.C. (2d) 190 (N.S.C.A.)

Regina v. Gougeon, Haesler, Gray (1981), 55 C.C.C. (2d) 218 (Ont. C.A.)

Defective Offence Notice

Failure of provincial offences officer to sign the Offence Notice which was given to the defendant at the scene is an irregularity or defect in substance or form within the meaning of section 90(1) of the **Provincial Offences Act** and does not affect the validity of the proceedings.

Regina v. Elliot (1981), 12 M.V.R. 35 (Ont. C.A.)

An Offence Notice which does not name the specific Provincial Offences Court is defective in form only.

Regina v. Callahan (1983), 21 M.V.R. 127 (Ont. H.C.)

Dispute Without Appearance

This procedure of a written dispute is not in effect in any part of Ontario. The enabling regulations have not been proclaimed as of January, 1987.

Summons from Another Justice

An informant is entitled to attend upon another Justice of the Peace or if he has additional evidence the same Justice subsequently when a Justice of the Peace initially refuses to issue a Summons.

Regina v. Allen (1974), 20 C.C.C. (2d) 447 (Ont. C.A.)

The Justice who issues the Summons need not be the same Justice before whom the Information was sworn.

Regina v. Southwick, Ex parte Gilbert Steel Ltd., [1968] 1 C.C.C. 356 (Ont. C.A.)

Service on a Corporation

It appears from the wording of section 27 of the **Provincial Offences Act** that the only acceptable process to use in the case of a corporation is a Summons under Part III. This may be served personally upon certain named office holders, by registered mail to the corporate address or substitutionally. Personal service upon a regular employee not specified in section 27 is not sufficient.

Regina v. Justice of the Peace, Ex parte Peel Construction Co. Ltd., [1970] 3 O.R. 688 (Ont. H.C.)

Re Laidlaw Transport Ltd. and The Queen, [1973] 3 O.R. 1014 (Ont. H.C.)

Summons After Limitation Period

Provided the Information was laid within the limitation period, the issuance or service of a Summons (or an arrest warrant) can occur outside the statutory time limit.

Regina v. Southwick, Ex parte Gilbert Steel Ltd., [1968] 1 C.C.C. 356 (Ont. C.A.)

Re Smerchanski et al. and The Queen (1979), 46 C.C.C. (2d) 54 (Man. Q.B.)

Spelling Errors in Wording

An Information and the Summons based thereon was valid although the offence in the Information was misspelled as "Carless Driving". The Summons given to the accused at the time which contained the appropriate section number along with the incorrectly worded Information gave the accused sufficient notice of the offence with which he was charged.

This principle is made applicable to Certificates of Offence, Offence Notices and Summonses and Informations by virtue of sections 13, 26, 27 and the Regulations made under the **P.O.A.**.

Regina v. Dodge, [1966] 1 O.R. 633 (Ont. H.C.)

Process Returnable on Incorrect Day

When a summons or other process is made returnable on an incorrect date when, for example the court is not sitting, jurisdiction over the defendant can be ensured by the issuance of another Summons or even a warrant.

Regina v. MacAskill (1981), 58 C.C.C. (2d) 361 (N.S.C.A.)

Re Littlejohn and The Queen (1982), 65 C.C.C. (2d) 486 (B.C.C.A.)

Defective Service of a Summons or Other Process

A defect in the service of any process such as a Summons or Offence Notice only allows a defendant to seek an adjournment. Even if the process does not comply with the statutory requirements such as service which must be made at the last or usual place of abode, jurisdiction over the charge is not lost. If the defendant has appeared in court, the matter should proceed to its merits. If no appearance, new process should issue.

Re Regina and Peters (1982), 63 C.C.C. (2d) 106 (Sask. Q.B.)

Regina v. Graham (October, 1982), (Ont. S.C.)

Process Upon an Amended Information

When an Information (or apparently a Certificate of Offence) is amended and resworn, the Information and process thereon are valid as part of the original proceeding and the limitation period is of no effect. Further it is not necessary to issue additional process after a defective Information (or Certificate of Offence) is amended.

Regina v. Peacock, [1954] O.W.N. 169 (Ont. H.C.)

Issuance of a Warrant

If the statute authorizes an arrest of the defendant, a Justice of the Peace may issue an arrest warrant. However he should issue a warrant only in cases where it is clear that a Summons will not be effective.

Regina v. Wentworth Magistrate's Court, Ex parte Reeves, [1964] 2 O.R. 316 (Ont. H.C.)

Stamped Signature

A Justice after judicially deciding to issue a Summons or warrant may either himself, or by some other person acting under his authority or direction, affix his signature with a stamp.

Regina v. Fox, [1958] O.W.N. 141 (Ont. C.A.)

ATTENDANCE OF WITNESSES

Introduction

The issuance of a subpoena by a Justice is a discretionary judicial act which requires a factual basis.

Re Regina and McConnell (1977), 35 C.C.C. (2d) 435 (Sask. C.A.)

Only a person who is able to give material and necessary evidence can be subject to a subpoena.

Section 40 of the Provincial Offences Act

Provincial Offences Act

See Sections 40, 41, 42 and 43.

Warrant Rather Than Subpoena

Only a Judge has the authority to issue a warrant for a recalcitrant witness or a person evading service unless the served witness does not attend or continue his attendance in court. Then a Justice can issue a warrant.

Section 41 of the Provincial Offences Act

Quashing a Subpoena

A subpoena may be quashed by a superior court on jurisdictional or other grounds such as an indirect or improper purpose.

Re Regina & McConnell (1977), 35 C.C.C. (2d) 435 (Sask. C.A.)

Re Baldwin and Bauer and The Queen (1981), 54 C.C.C. (2d) 85 (Ont. H.C.)

Subpoena Served on Defence Counsel

A subpoena served on a defence counsel will not be quashed if it was issued for a proper purpose even though it may force a defendant to retain other counsel.

Re Cameron and The Queen (1980), 48 C.C.C. (2d) 222 (Sask. Q.B.)

Subpoena Served on Crown Counsel

A subpoena served on Crown counsel in an effort to ascertain reasons for exercising prosecutorial discretion will be quashed as such evidence is irrelevant and not material.

Re Baldwin and Bauer and The Queen (1981), 54 C.C.C. (2d) 85 (Ont. H.C.)

An applicant seeking to subpoena Crown counsel who has carriage of the particular prosecution must establish by evidence that Crown counsel can give material evidence. It is not enough to merely make such an allegation nor to examine the Crown counsel with the hope of turning up such evidence i.e., no fishing expeditions. Otherwise the administration of justice could be randomly interrupted and thereby impaired.

Regina v. Stupp et al. (1982), 36 O.R. (2d) 206 (Ont. H.C.)

CERTIFICATE OF OFFENCE

Introduction

The Certificate of Offence is intended to expedite proceedings without eliminating any of the safeguards available to a defendant. It is within the discretion of the provincial offences officer whether he will commence proceedings by the filing of a Certificate or seek a higher penalty under the procedures described in Part III of the **Provincial Offences Act**. A private citizen cannot make use of this optional and less complicated procedure.

Provincial Offences Act

See sections 3, 4, 13 and 35 and Regulations made thereunder.

Commencement of Proceedings

It is the filing of the Certificate of Offence as soon as practicable after service of the Offence Notice or Summons that starts the proceedings.

Sections 3 and 4 of the Provincial Offences Act

Errors in Certificates of Offence

As to the misspelling of a defendant's name see *Appellation non Contrôlée: The Misspelling of the Defendant's Name in Informations or Certificates of Offence*, by J. Douglas Ewart (1980-81), Volume 23 *The Criminal Law Quarterly*, p. 492-496. The author provides several authorities which indicate that a misspelled name is not sufficient reason to preclude a trial on the merits which would determine if the person before the court committed the offence charged.

A Certificate which omitted the word "Issuing" from the phrase "signature of issuing provincial offences officer" was not fatally defective and was capable of amendment.

Regina v. Thompson (1981), 12 M.V.R. 196 (Ont. S.C.)

A Certificate which did not name the judicial district or county in which the Provincial Offences Certificate was filed was valid.

Regina v. Greenspan (1982), unreported (Ont. Prov. Offences Appeal Court) affirmed September 16, 1982, (Ont. C.A.)

The omission of the name of the court is curable by amendment.

Regina v. Matsuba (1982), 17 M.V.R. 221 (Ont. H.C.)

Regina v. Keast (1982), unreported (Ont. S.C.)

Regina v. Arnold (1982), 17 M.V.R. 61 (Ont. H.C.)

Defects which Nullify the Certificate

It is submitted that a Certificate of Offence which is not completed properly in significant matters is a nullity which will be quashed by the court examining it. Minor technical errors such as the wrong date or the incorrect spelling of the defendant's name can be amended and do not render the Certificate of Offence a nullity. However, defects which do render the Certificate a

nullity are:

1. no date of offence
2. no name of defendant
3. no location of offence
4. no offence
5. no signature of the provincial offences officer
6. no set fine

Signature of Person Charged

Section 3(4) indicates that upon the service of an Offence Notice or Summons, the charged person shall be requested to sign the Certificate of Offence, but failure to sign does not affect the Certificate or the service.

Section 3(4) is directory and not mandatory. A failure to make such a request does not invalidate the proceedings nor otherwise affect the jurisdiction in the matter.

Regina v. Wismer (August, 1983), unreported (Ont. Prov. Ct.)

Regina v. Elliot (1981), 12 M.V.R. 35 (Ont. C.A.)

A failure to request the defendant's signature is a defect in form or substance within the meaning of section 90 and does not affect the validity of the proceedings.

Regina v. Golden (January, 1985), unreported (Ont. Prov. Ct. — Prov. Offences Appeal Court)

The appearance of the defendant in court should illustrate the absence of any prejudice to him and would confirm the court's jurisdiction over the defendant.

Regina v. Gougeon et al. (1981), 55 C.C.C. (2d) 218 (Ont. C.A.)

CONTEMPT OF COURT

Introduction

Prior to the **Provincial Offences Act**, there was some doubt that a Justice of the Peace had the authority to punish contempts in the face of the court. His power was limited to the removal or exclusion of persons who by disorderly conduct obstructed or interfered with the business of the court.

Young v. Saylor (1893), 23 O.R. 513 (Ont. C.A.)

Re Reiben (1920), 30 C.C.C. 271 (Sask. K.B.)

This limited authority was due to the fact that a court of the Justice of the Peace was not a court of record. Therefore, it remained for a superior court to deal with persons in contempt before courts of Justices of the Peace.

By section 68 of the **Courts of Justice Act**, a Provincial Offences Court is now a court of record and has the authority to convict persons of contempt in the face of the Provincial Offences Court.

However, the law of contempt is not designed to protect a specific judicial official but rather to ensure an independent administration of justice free from intimidation by improper conduct. Therefore, the power ought to be used cautiously and sparingly.

Different Types of Contempt

Various jurisdictions have different classifications of contempt such as direct, constructive, civil, criminal et cetera. These can be classified as follows:

“Contempt offences fall within two broad categories, viz., contempt in the face of the court (contempt in facie) and contempts committed outside the court (contempt ex facie). A contempt in the face of the court may be broadly described as any word spoken or act done in, or in the precincts of, the court which obstructs or interferes with the due administration of justice or is calculated so to do. Forms of conduct which have been held to constitute such contempt are: assaults committed in court; insults to the court; interruption of court proceedings; refusal on the part of a witness to be sworn, or having been sworn, refusal to answer. Conduct which amounts to contempt outside the court may be described in general terms as words spoken or otherwise published, or acts done, outside court which are intended or likely to interfere with or obstruct the fair administration of justice. Common examples of such contempts are: publications which are intended or likely to prejudice the fair trial or conduct of criminal or civil proceedings; publications which scandalize, or otherwise lower the authority of the court, and acts which interfere with or obstruct persons having duties to discharge in a court of justice: 9 Hals., 4th ed., pp. 4-8, paras. 5, 6 and 7.”

Regina v. Cohn (1984), 15 C.C.C. (3d) 150 at 156 (Ont. C.A.)

Courts of Justice Act

See Sections 71 and 72.

Contempt Generally Defined

“Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity.”

Black’s Law Dictionary, Fifth Edition, 288.

It is clear that it is conduct that interferes with the administration of justice, not just an attitude of disgust or obvious disrespect.

“Any act done or anything published tending to obstruct, impair or interfere with the fair administration of justice or to bring the court or judge into contempt or lower his authority.”

McRuer, C.J.H.C. “Criminal Contempt of Court Procedure” 30 Can. Bar Review 225 at 226.

Initiation of Proceedings

For contempt in the face of the court, there are three methods of commencing proceedings:

1. An oral citation which should be dealt with immediately or after allowing the contemner an opportunity to obtain counsel.
2. An oral direction to alleged contemner to appear at a specified time to show cause why he should not be cited for contempt.
3. A written direction to the alleged contemner to appear in court for a show cause.

Procedure for Contempt Hearing:

1. The court should advise the party of the alleged contemptuous conduct.
2. The court must inform the offender of the nature of the contempt, i.e., the specific offence.
3. The offender must be informed of his right to show cause why he should not be punished.
4. The offending party should be given an opportunity to show cause i.e., to explain the contempt. He may require time to arrange and subpoena witnesses.
5. The court should conduct the hearing according to the principles of natural justice, i.e., hear all the witnesses under oath, allow examination in chief and cross-examination, allow the party to make full answer and defence, and hear arguments of both sides.
6. The onus is proof beyond a reasonable doubt that the act done is calculated or tends to bring the Judge in his official capacity into contempt or to lower his authority.

McLeod v. St. Aubyn, [1899] A.C. 549.

Examples of Contempt in the Face of the Court:

1. “. . . demonstrations in the courtroom by shouting, noisy behaviour, applauding a verdict of a jury or a decision of a judge; refusing to give evidence when properly subpoenaed as a witness or to answer relevant questions; refusing to leave the courtroom when ordered to do so or to obey the orders of a court as to a trial which is in progress . . . or using abusive or disrespectful language to a judge presiding at a trial.”

McRuer, C.J.H.C. “Criminal Contempt of Court Procedure” 30 Can. Bar Review 225 at 227.

2. An accused who referred to the Crown attorney, among other things, as corrupt.
Paul v. The Queen (1980), 52 C.C.C. (2d) 331 (S.C.C.)
See also Rex v. George (1936), 3 W.W.R. 177
3. An accused who after sentencing threatened the complainant.
Regina v. Vermette (1984), 6 C.C.C. (3d) 97 (Alta. C.A.)
4. The deliberate failure of a lawyer to attend court when required to is prima facie a contempt of court.
Barrette v. The Queen (1976), 29 C.C.C. (2d) 189 at 192 (S.C.C.)

A lawyer who was retained and wilfully failed to obey a Judge's Order to appear in court at a certain time was in contempt.
McKeown v. The Queen (1971), 2 C.C.C. (2d) 1 (S.C.C.)
Regina v. Hill (1974), 27 C.R.N.S. 200 (B.C.S.C.)

A lawyer who was "double booked" and failed to attend court when required without securing substitute counsel or making other arrangements.
Regina v. Anders (1982), 25 C.R. (3d) 12 (Ont. Co. Ct.) affirmed May 14, 1982, by (Ont. C.A.)

A lawyer who fails to attend court through inadvertence i.e., he honestly forgot, or he has a justifiable excuse, will not necessarily be in contempt.
Regina v. Jones (1978), 42 C.C.C. (2d) 192 (Ont. C.A.)
Regina v. McLachlan and Lockyer (1980), 17 C.R. (3d) 312 (Ont. S.C.)

A lawyer who attempts to withdraw from a case and indicates he is going to leave the courtroom after an adverse ruling will not necessarily be in contempt.
Regina v. Swartz (1977), 34 C.C.C. (2d) 477 (Man. C.A.)

While a counsel who deliberately fails to appear in court may be found in contempt, a counsel who is merely discourteous in that he was late in arriving due to some explainable circumstance will not be in contempt.
Regina v. Fox (1976), 30 C.C.C. (2d) 330 (Ont. C.A.)
5. A counsel's insolent and discourteous or otherwise objectionable comments about the presiding judicial official.
Re Morris C. Shumiatcher, Q.C. (1968), 64 W.W.R. 743 (Sask. C.A.)
6. A counsel in open court requesting the withdrawal of a member of the bench for no express reason.
Re Duncan (1957), 11 D.L.R. (2d) 616 (S.C.C.)
7. A deliberate refusal of an accused to rise when the presiding Magistrate came into the courtroom.
Regina v. Hume, Ex parte Hawkins, [1966] 3 C.C.C. 43 (B.C.S.C.)
8. Persons fighting in the courtroom before the presiding Judge.
Regina v. Ball & Parro (1971), 14 C.R.N.S. 238 (Ont. C.A.)
9. An accused who referred to the presiding Judge as "prejudiced, partial, a fanatic, a real comic, . . . a lousy person."
Chartrand v. The Queen (1971), 21 C.R.N.S. 49 (Que. C.A.)
10. A witness although properly subpoenaed declined to be sworn or to give evidence.
Re Gerson (1946), 3 C.R. 111 (S.C.C.)
Regina v. Cohn (1984), 15 C.C.C. (3d) 150 (Ont. C.A.)

Barring Counsel and Others From Appearing

Upon a conviction for contempt, in addition to a monetary or other penalty, the court may prohibit a lawyer from appearing in that court until an apology is given.

Re Duncan (1957), 11 D.L.R. (2d) 616 (S.C.C.)

The Judge's power to bar counsel from his court until the contempt is purged by an apology is superior to an accused's right to counsel of his choice.

Re William Thomas Mulligan (1971), 15 C.R.N.S. 382 (Ont. S.C.)

By virtue of section 71(7) of the **Courts of Justice Act**, an agent who is not a lawyer may, in addition to any other penalty, be barred from acting in the proceeding.

Disturbances Outside Courtroom

Provincial Offences Courts have authority only to deal with courtroom conduct except for persons who knowingly and without reasonable justification disturb the proceedings while outside the courtroom. This conduct could result in a typical Offence Notice or Information with the concurrent process.

The Provincial Courts Act: Section 21.

Charter

The procedure for dealing with contempt in the face of the court does not violate sections 7, 11(c), 11(d) or 11(f) of the **Charter**.

Regina v. Cohn (1984), 15 C.C.C. (3d) 150 (Ont. C.A.)

COUNSEL

Introduction

Prior to the **Charter** the right of a defendant to retain counsel was primarily drawn from common law whereas the rights and duties of counsel once retained are derived from both common law and various statutes.

Even though a defendant may wish to have only his counsel or agent attend court on his behalf, the court may order the defendant to appear personally in certain circumstances.

Provincial Offences Act: Section 52

Regina v. Duperon and Bence, [1965] 3 C.C.C. 344 (Sask. C.A.)

The right to have a defendant appear in court apparently includes the right to have the defendant identify himself by coming forward in court rather than remaining in the public seating area in the courtroom.

Re Conrad and The Queen (1973), 12 C.C.C. (2d) 405 (N.S.S.C.)

A defendant is deemed to have appeared if counsel instructed by him appears in court and no process such as a warrant nor a charge of failing to appear based on his personal non-appearance should issue.

Provincial Offences Act: Section 51(1)

Regina v. Okanee (1981), 59 C.C.C. (2d) 149 (Sask. C.A.)

Provincial Offences Act

See sections 51, 52, 57, 58, 82 and 92.

Defendant's Right to Counsel

"It is a fundamental principle of our criminal law that the choice of counsel is the choice of the accused himself, that no person charged with a criminal offence can have counsel forced upon him against his will, and that it is the paramount right of the accused to make his own case to the jury if he so wishes, instead of having it made for him by counsel."

Vescio v. The King (1948), 92 C.C.C. 161 (S.C.C.) per Tachereau, J. at 164-165.

"It is of course fundamental that a person accused of a crime is entitled to make full answer and defence either personally or by counsel of his choice and that an accused may decline the services of counsel nominated by the Court."

Vescio v. The King, supra, per Locke, J. at 174-175.

The accused must be given a reasonable opportunity to consult or retain counsel. If given such an opportunity and the defendant is unable to secure counsel, the presiding judge is required to ensure that the accused receives a fair trial.

Regina v. Ewing and Kearney (1974), 25 C.R.N.S. 130 (B.C.S.C.) affirmed (1975), 29 C.R.N.S. 227 (B.C.C.A.)

An accused who at the proceedings is deprived of counsel through no fault of his own, e.g., the lawyer simply does not attend, should not be forced to proceed.

Barrette v. The Queen (1976), 29 C.C.C. (2d) 189 (S.C.C.)

Unavailability of Counsel

When a trial date has been set and counsel who is then retained is unable to appear on the

selected date, the defendant should retain other counsel. "The right to counsel of the accused's choice, in my opinion, means counsel of the accused's choice who is able to appear on the date which has been set for trial."

Regina v. Taylor (February 11, 1980), unreported (Ont. C.A.)

Re R. and Chimienti et al. (1980), 17 C.R. (3d) 306 (Ont. S.C.)

Regina v. Gouveia (September 30, 1982), unreported (Ont. C.A.)

Withdrawal of Defence Counsel

An accused is entitled to discharge his counsel at any time allowing the counsel to thereby withdraw. However this termination by the client must be unequivocal to be effective.

Regina v. Spataro (1971), 4 C.C.C. (2d) 215 (Ont. C.A.) affirmed by S.C.C. at (1972), 7 C.C.C. (2d) 1

See Rule 11 in Professional Conduct Handbook, The Law Society of Upper Canada, concerning the withdrawal of services by a lawyer.

See also a Notice to the Profession governing the right of counsel to withdraw from a criminal case reported at (1970), 12 C.R.N.S. 365.

Conflict of Interest

A defendant's right to retain a certain lawyer does not allow that lawyer to act who, in doing so, would not be acting professionally, e.g., the lawyer or his associate acted for A, not able to act for B against whom A will testify.

Regina v. Speid (1984), 8 C.C.C. (3d) 18 (Ont. C.A.)

EXCLUSION OF WITNESSES

Introduction

Unless an exclusion order is made by the judicial official, prospective witnesses are entitled to remain in the courtroom. If an order of exclusion is made, the prospective witnesses should also be advised not to speak with each other or with witnesses who have testified. The rationale for ordering an exclusion is to prevent witnesses from tailoring their own evidence.

The application may be made by either the defence or the prosecution. It is effective from the point of the order on and applies to the witnesses for both sides.

Discretionary Order

Although a judge will usually grant an order of exclusion if it is requested, he has a discretion to grant or deny the request.

Cobbett v. Hudson (1852), 18 E.R. 341

Sanctions Against Witness who Remains

A court cannot refuse to hear a witness who disobeys an order of exclusion. However, if the disobedience is wilful, the witness may be subject to contempt. An inadvertent disobedience may be a factor in weighing the testimony of the witness.

Rex v. Carefoot (1948), 90 C.C.C. 331 (Ont. H.C.)

Dobberthien v. The Queen (1975), 18 C.C.C. (2d) 449 (S.C.C.)

Re Regina v. O'Callaghan (1982), 65 C.C.C. (2d) 459 (Ont. S.C.)

Exceptions to the Order

There are several types of witnesses who are commonly allowed to remain in the courtroom while other witnesses testify:

1. An expert who will be giving his opinion based on the factual testimony of others.
Re Regina v. O'Callaghan (1982), 65 C.C.C. (2d) 459 (Ont. S.C.)
2. A person who may assist a proponent to present the case. "The police officer in charge of a case is usually excepted from the order."
Canadian Criminal Evidence, McWilliams 1974 Canada Law Book Ltd., at p. 588
Re Regina v. O'Callaghan (1982), 65 C.C.C. (2d) 459 (Ont. S.C.)
3. A witness who after the order was made becomes necessary to call in reply.
Rex v. Carefoot (1948), 90 C.C.C. 331 (Ont. H.C.)
4. The parties, i.e., accused/defendant, to the action. The accused person(s) or the defendant must be present in the courtroom throughout a trial except in very limited circumstances, such as misconduct or during a fitness hearing.
Section 53 Provincial Offences Act
Section 577 of the Code

However, an accused/defendant should take the stand as the first defence witness or risk adverse judicial comment on the weight of his testimony if he does not testify first.

Rex v. Christenson (1923), 39 C.C.C. 203 (Alta. C.A.)

When a defence of alibi is advanced, it is especially important for the accused/defendant to

be called first in order to preclude the comment that his evidence was made to conform with preceding defence testimony.

Regina v. Archer (1974), 26 C.R. 225 (Ont. C.A.)

Communication with Counsel

The rule as to non-communication with excluded witnesses does not preclude counsel from conferring with such witnesses after their exclusion and before taking the witness stand.

Regina v. Arsenault (1956), 115 C.C.C. 400 (N.B.C.A.)

Re Regina v. O'Callaghan (1982), 65 C.C.C. (2d) 459 (Ont. S.C.)

Indeed counsel cannot be included within a non-communication order in relation to excluded witnesses. Counsel are however bound to observe the **Rules of Professional Conduct** in spirit as well as in the letter when consulting with excluded witnesses.

The lawyer should observe the following guidelines respecting communication with witnesses giving evidence:

- (a) During examination in chief by the lawyer of his own witness: it is not improper for such lawyer to discuss with the witness any matter that has not been covered in the examination before such discussion.
- (b) During examination in chief by another lawyer of his witness who is not sympathetic to the lawyer's cause: it is not improper for the lawyer (not conducting the examination in chief) to discuss the evidence with such a witness.
- (c) Between completion of examination in chief and commencement of cross-examination of the lawyer's own witness: there ought to be no discussion of the evidence given in chief or relating to any matter introduced or touched upon during the examination in chief.
- (d) During cross-examination by an opposing lawyer: while his witness is under cross-examination the lawyer ought not to have any conversation with him respecting his evidence or relative to any issue in the proceeding.
- (e) Between completion of cross-examination and commencement of re-examination: the lawyer whose witness is to be re-examined by him ought not to have any discussion respecting evidence that will be dealt with on re-examination.
- (f) During cross-examination by the lawyer of a witness not sympathetic to the cross-examiner's cause: it is not improper for such lawyer to discuss with such a witness the evidence of that witness.
- (g) During cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause: in this case conversations ought to be restricted as in the case of communications during examination in chief of one's own witness.
- (h) During re-examination of witness called by an opposing lawyer: if the witness is sympathetic to the lawyer's cause there ought to be no communication relating to the evidence to be given by that witness during re-examination. If the witness is adverse in interest, it does not seem improper for such lawyer to discuss the evidence of that witness with him.

If the lawyer questions whether his conduct may be in violation of a rule of conduct or professional etiquette, often it will be appropriate to obtain the consent of the opposing lawyer

and leave of the court before engaging in conversations that may be considered improper or a breach of etiquette.

Rule 8, Commentary 15, the Rules of Professional Conduct, The Law Society of Upper Canada, considered and approved in *Re Regina v. O'Callaghan* (1982) 65 C.C.C. (2d) 459 (Ont. S.C.)

INFORMATION

Introduction

The document which may commence the proceedings known as an Information is sworn to by an informant who makes allegations which legally constitute an offence. Its purpose is to inform the defendant of the particular accusation against him and to give the court jurisdiction to deal with the matter.

The judicial official must manually sign the jurat on an Information.

The Queen v. Welsford, [1969] 4 C.C.C. 1 (S.C.C.)

The actual drafting of the wording of the Information whether it be by a Justice of the Peace or a provincial offences officer should provide the defendant with a definitive informative allegation. However, the explicit intent of the **Provincial Offences Act** is to preclude technicalities from interfering with a hearing as to the merits of the charge. See for example subsections 26(3), 35(3), 37(2) which elucidate the philosophy of **Regina v. Côté** (1978), 40 C.R.N.S. 308 (S.C.C.) and **Regina v. Sault Ste. Marie** (1978), 3 C.R. (3rd) 30 (S.C.C.). See cases *infra* re AMENDMENTS for judicial examples of this different approach in provincial offence matters.

Provincial Offences Act

See sections 22, 23, 24, 25, 26, 34, 35, 37, 46, 90, 107, 145.

Duties of the Justice

The Justice is obligated to receive the complaint or allegation if it is properly presented, i.e., if the informant has reasonable and probable grounds.

The next step requires the exercise of some discretion and is considered to be a judicial function, namely whether he should issue process to compel the defendant to answer the allegation or what type of process would be effective. This may be done either without any additional evidence or it may occur after the holding of an *ex parte* hearing during which the informant and/or his witnesses would testify but however it is conducted, it must be judicially determined.

McDonald et al. v. A.G. of Alberta et al., [1968] 4 C.C.C. 362 (Alta. S.C.)

Re Bokor and Justices of the Peace (1971), 4 C.C.C. (2d) 177 (Ont. H.C.)

Re Swan et al., *Ex parte Syme* (1980), 48 C.C.C. (2d) 501 (Ont. H.C.)

Who May Be An Informant

Under the **Provincial Offences Act**, a citizen must commence proceedings by swearing an Information and a provincial offences officer may do so for any number of reasons such as the possible imposition of a higher monetary penalty upon conviction. **Provincial Offences Act**: Sections 22, 23, 24 and s.62.

Contents of an Information

Each count must relate to a single transaction and must contain a statement that the defendant committed a specified offence which is sufficiently described so as to provide the defendant with enough detail that he can identify the transaction. The statement may be in popular language, in the words of the enactment or in words which are sufficient to give the defendant notice of the offence with which he is charged. Further, it ought to contain a reference to the section and statute contravened.

Any number of such counts may be contained in a single Information but it is suggested that contraventions of different provincial Acts should be alleged in different Informations.

Single Transaction

Whereas each count should relate to a single transaction, a “transaction” may be made up of several factual occurrences which are related and can therefore be the subject of a single count.

Regina v. Flynn (1955), 111 C.C.C. 129 (Ont. C.A.)

The word “transaction” is not synonymous with “offence” and the rule that a count shall in general apply to a single transaction does not mean that each unlawful occurrence must always be the subject of a separate count.

Regina v. Cotroni; Papalia v. The Queen (1979), 45 C.C.C. (2d) 1 (S.C.C.)

The single transaction rule applies only to the wording of the charge not to the evidence which may be led at the trial upon that charge.

Regina v. Labine (1976), 23 C.C.C. (2d) 567 (Ont. C.A.)

The events may be related in time, place, method, victim. For example, when five people successively raped one victim on the same bed, the single count covered the whole course of their conduct and was in effect one transaction.

Regina v. Zamal et al., [1964] 1 C.C.C. 12 (Ont. C.A.)

A count alleging one offence over approximately six months was valid when the evidence actually disclosed several offences within that period. The offences were capable of being treated as one transaction because the intent remained the same throughout.

Regina v. Hulan, [1970] 1 C.C.C. 36 (Ont. C.A.)

Some offences by their very nature are continuing offences and several illegal incidents may be described in a single count as a single transaction.

Regina v. Labine (1976), 23 C.C.C. (2d) 567 (Ont. C.A.)

A single act may be considered as one transaction even though it results in simultaneous consequences to several different victims.

Regina v. Porter (1977), 33 C.C.C. (2d) 215 (Ont. C.A.)

However when the unlawful incidents occur at different times and places, to different victims by means of different modes of conduct, they ought to be pleaded as separate counts.

Regina v. Rafael (1972), 7 C.C.C. (2d) 325 (Ont. C.A.)

A single count may cover several incidents which constitute a course of illegal conduct and if the evidence only proves some of the acts were unlawful, the charge remains valid.

Regina v. Barnes (1975), 26 C.C.C. (2d) 112 (N.S.C.A.)

Defects within Informations

Section 35 of the **Provincial Offences Act** provides for wide powers of amendments to Informations and Certificates. Subsection 37(2) and section 38 reinforce these powers. See **AMENDMENTS** *infra* for a fuller description of this issue.

Defects which Nullify Informations

An Information which has significant omissions may be quashed. As with Certificates,

minor technical errors must be amended, however it is submitted that the following errors, omissions or defects will probably result in the quashing of an Information:

1. no date of offence
2. no name of defendant
3. no location of offence
4. no offence at all or none known to law
5. no signature of informant
6. Information is unsworn
7. the entire matter is ultra vires the legislative authority
8. the Information was sworn after the limitation period

JOINDER OF COUNTS

Introduction

The common law practice of including any number of counts in an Information is continued in the **Provincial Offences Act**. It has been suggested that a provincial offence and a **Criminal Code** offence can be included in the same Information and tried together.

Ontario Provincial Offences Procedure, Drinkwater and Ewart, 1980 The Carswell Company Ltd., at p. 101.

Provincial Offences Act

See Sections 26(5) and 39(1).

Severance of Counts

See *infra*.

JOINDER OF DEFENDANTS

Introduction

The **Provincial Offences Act** statutorily changed the previous law which did not allow defendants charged in separate Informations to be tried together. There is no such provision in the **Criminal Code**. Although it is a practice to be avoided, as an investigation proceeds it may be advisable to charge one person and his admissions may lead to another and so on. Also it is infrequent for Crown counsel to play any part in the charging step of the procedure. In the past, where several defendants were charged separately, this prohibition necessitated several separate trials with the extra expense, inconvenience to witnesses and the possibility of apparently inconsistent rulings and decisions.

The ordering of a single trial is a matter within the discretion of the judicial officer at the trial and will not be interfered with unless he decided on an incorrect judicial principle.

Regina v. Agawa and Mallet (1975), 28 C.C.C. (2d) 379 (Ont. C.A.)

Provincial Offences Act

See Subsection 39(1).

Source

Trial of Accused Persons Together, Law Society of Upper Canada Special Lectures, 1959, at p. 15.

Reasons to Join Defendants into a Single Trial

The grounds to be advanced for requesting that separately charged persons be tried together are generally the same as the submissions to be made against severing counts or accused. Therefore, see **SEVERANCE OF DEFENDANTS** and **SEVERANCE OF COUNTS** *infra*.

Test for a Single Trial

Persons engaged in a common enterprise should be tried together unless the interests of justice require separate trials.

Rex v. Grondkowski and Malinowski (1946), 31 Cr. App. R. 116

Regina v. Lane and Ross, [1970] 1 C.C.C. 196 (Ont. H.C.)

Regina v. de Tonnancourt et al. (1956), 115 C.C.C. 154 at 182 (Man. C.A.)

Regina v. Quiring and Kuipers (1975), 19 C.C.C. (2d) 337 (Sask. C.A.) leave to appeal to S.C.C. refused (1975), 28 C.R.N.S. 128

Regina v. Agawa and Mallet (1975), 28 C.C.C. (2d) 379 (Ont. C.A.)

The interests of justice include the interest of the accused and the public interest in the administration of justice.

Rex v. Grondkowski and Malinowski, *supra* per Lord Goddard at p. 119

Regina v. Hoggins et al. (1967), 51 Cr. App. R. 444 at 448

JURISDICTION OVER OFFENCE

Introduction

Traditionally, although an offence was considered to be a breach of Her Majesty's peace, and therefore of interest to the whole of society, it was felt that the interests of the local citizenry required that crimes be tried locally. This allowed the local residents to see first hand the administration of justice. It also served to convenience jurors, witnesses and the accused. From this came the principle that a defendant generally had the right to be tried in the county or district in which the offence was committed.

Provincial Offences Act

See Section 30.

Courts of Justice Act

See Sections 68 and 69.

Geographical

A territorial limitation requires the proceeding to be held within the area where the offence occurred. The area is the county or district and the court may sit at any place within the county or district designated by the Chief Judge of the Provincial Offences Court.

Regina v. Simons (1976), 34 C.R. 273 (Ont. C.A.)

Provincial Courts Act R.S.O. 1980 Chapter 398, Sections 18 and 19

Provincial Offences Act R.S.O. 1980 Chapter 400, subsection 30(1)

An offence may be heard in another Provincial Offences Court that is not within the territorial jurisdiction of the offence if it is reasonably proximate to the location of the offence and if the Offence Notice or Summons directs an appearance be made in the adjoining court. Upon the consent of the parties or if the interests of justice require it, a matter can be transferred to any other Provincial Offences Court in Ontario.

Provincial Offences Act: Section 30.

Change of Venue

In addition to a consensual change of location for the trial, a court may, upon application, order a proceeding transferred to another court in Ontario if "it would be appropriate in the interests of justice".

Though the power to order a proceeding moved is discretionary, it should be used with great caution and there must be clear and plain reasons for it.

Rex v. DeBrue (1927), 47 C.C.C. 31 (Ont. S.C.)

Rex v. Adams (1946), 86 C.C.C. 425 (Ont. H.C.)

Regina v. Turvey (1970), 12 C.R.N.S. 329 (N.S.S.C.)

Some of the reasons for the change of criminal trials to other locales have been:

1. There has been a reasonable probability of local prejudice against the accused.
Regina v. Beaudry, [1966] 3 C.C.C. 51 (B.C.S.C.)
Re Trusz and The Queen (1974), 20 C.C.C. (2d) 239 (Ont. H.C.)

There must be more than the possibility of prejudice however it is said to be caused.

Regina v. Turvey (1970), 12 C.R.N.S. 329 (N.S.S.C.)

The King v. Graves et al. (1912), 19 C.C.C. 402 (N.S.S.C.)

2. It plainly appears that a fair and impartial trial cannot be held, e.g., newspaper accounts very sympathetic to victim.

Rex v. Adams (1946), 86 C.C.C. 425 (Ont. H.C.)

Regina v. Martin, [1964] 2 C.C.C. 390 (Sask. Q.B.)

Rex v. Bochner and Ruby (1944), 82 C.C.C. 83 (Ont. H.C.)

3. The convenience of witnesses is only a secondary consideration within the total context of the application.

Regina v. Kellar (1974), 24 C.R.N.S. 71 (Ont. Co. Ct.)

4. The condition of the courtroom and courthouse.

Regina v. Izzard (1971), 3 C.C.C. (2d) 270 (N.S.S.C.)

Some possible arguments against the changing of the venue of a proceeding might be:

1. The justice is under a sworn duty to decide a case only on the evidence adduced in the courtroom.

2. A justice may have heard or read some of the media reports concerning the defendant however it is unlikely that he would have heard it all or that he would retain the details thereof.

Rex v. Adams (1946), 86 C.C.C. 425 (Ont. H.C.)

3. The application was not made at the earliest opportunity to allow for the necessary transfer of materials to the other court.

4. The witnesses will be unduly inconvenienced.

5. Television and radio coverage are province-wide and therefore another justice may also have heard the same reports.

6. It has not been demonstrated that the suggested alternative jurisdiction did not receive substantially the same media reports as the original venue.

Regina v. Vaillancourt (No. 1) (1973), 31 C.R.N.S. 73 (Ont. S.C.)

7. There are inherent safeguards to ensure fair trials such as rules of evidence and prerogative remedies for breaches of natural justice.

8. The application was not based on proven facts. Opinions or beliefs are insufficient.

Rex v. Adams (1946), 86 C.C.C. 425 (Ont. H.C.)

9. The passage of time has removed any influence that media reports may have had on the mind of the original justice.

10. An adjournment (lengthy) may suffice to limit the prejudicial effects of the publicity which was adverse to the defendant.

JURISDICTION OVER OFFENDER

Introduction

The defendant may be before the court by means of a Summons, an Offence Notice, a Notice of Trial, an Undertaking, a Recognizance, a Warrant, or a voluntary appearance.

See ATTENDANCE OF DEFENDANT *infra*.

Once the defendant is before the proper court which possesses a valid charging document, it is incumbent on that court to retain its authority over the defendant until the matter is concluded. This particular jurisdiction, once lost, can only be regained by fresh process.

Provincial Offences Act

See sections 31, 32, 50 and 55.

Upon Adjournments

If the Justice decides to grant an adjournment for an in custody defendant, the matter cannot be put over for more than eight days unless the defendant consents.

This eight day rule applies to the end of the matter, including the imposition of the sentence.

If the adjournment is ordered over the objections of the defendant, he may then consent to an adjournment beyond eight days.

Jouts v. Regina (1980), 17 C.R. (3d) 289 (Ont. C.A.)

If the matter is adjourned without consent beyond eight days, section 32 of the **Provincial Offences Act** retains the court's jurisdiction over the offence however new process may be required if the defendant does not show up on the adjourned date.

Regina v. Stedelbauer (1975), 19 C.C.C. (2d) 359 (Alta. C.A.)

Ex Parte:

When service and notification are proved by the prosecutor, a Provincial Offences Court may hear a matter in the absence of the defendant. This power, if exercised after the prerequisite proof is tendered, constitutes a statutory jurisdiction over the charge i.e., the Certificate of Offence or the Information, and the offender.

Regina v. Okanee (1981), 59 C.C.C. (2d) 149 (Sask. C.A.)

A court should not proceed *ex parte* if there is known to be a valid reason for the failure of the defendant to appear e.g., a message to the court of adverse weather conditions.

McLeod v. Regina (1984), 36 C.R. (3d) 378 (N.W.T.S.C.)

Stage When Jurisdiction Attaches

Prior to 1892, a Justice who received an Information and issued process became exclusively seized of the matter. This rule was eventually abrogated partly by the doctrine of waiver and partly by amendments. Section 31 of the **Provincial Offences Act** specifically indicates that the justice is seized with jurisdiction only by the commencement of the hearing of evidence and must continue unless he dies, is unable to continue, or the parties consent to another justice conducting the hearing.

Jurisdiction of the Justice Compared

A Justice of the Peace is usually commissioned to act in any county or district within Ontario. His jurisdiction is therefore broader than that of a particular Provincial Offences Court that has geographical limits.

Justices of the Peace Act R.S.O. 1980 chapter 227, Section 2.

Therefore a Justice of the Peace may accept an Information and issue process in one county as long as he makes the process returnable in the area of the appropriate Provincial Offences Court where the offence occurred.

Rex v. Tally (1915), 23 C.C.C. 449 (Alta. S.C.)

Over Offences in Several Jurisdictions

In the situation where an offence occurred in more than one jurisdiction, e.g., wilfully avoiding a police officer, section 189a H.T.A., any court within which the offence occurred has the jurisdiction to try the matter. The test is whether any element of the offence has occurred in the area claiming jurisdiction.

Regina v. Bigelow (1982), 69 C.C.C. (2d) 204 (Ont. C.A.)

Bell v. The Queen (1983), 8 C.C.C. (3d) 97 (S.C.C.)

JUSTICE OF THE PEACE

Introduction

All Provincial Court Judges are Justices and can perform such functions as issuing Summonses and warrants; however, all Justices are not Provincial Court Judges.

Historically, Justices of the Peace performed administrative functions and also sat with Judges to hear felonies and misdemeanours. In lesser offences, they sat alone.

They continue to preside over judicial interim release hearings and try most provincial offences. It has been observed that the role of the Justice of the Peace has been substantially enhanced in the last decade or more so that he occupies much of the role previously discharged by the abolished office of the Magistrate.

Re Currie and The Niagara Escarpment Commission (1984), 13 C.C.C. (3d) 35 (Ont. S.C.); aff'd. December, 1984 (Ont. C.A.)

Provincial Offences Act

See sections 1(1)(c) and 31

Role of

When presiding at the hearing of a matter, the Justice should for the most part listen impartially and allow counsel for both sides to conduct their own case within the rules of evidence and procedure.

“And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost: see **Regina v. Clewer** (1953), 37 Cr. App. R. 37. The judge’s part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.”

Jones v. National Coal Board, [1957] 2 Q.B. 55 per Lord Denning at 64, adopted by Porter, C.J.O., in Regina v. Viger (1958), 122 C.C.C. 159 at 161 (Ont. C.A.)

“We think it is the right of a litigant to have his case submitted to the trial tribunal as his counsel thinks advisable and in the interests of his client — being governed, of course, by the rules governing trial which are well-established and recognized; the trial Judge has no right to take the case into his own hands, and out of the hands of counsel”.

Boran et al. v. Wenger, [1942] O.W.N. 185, approved by Porter C.J.O. in Regina v. Viger, supra.

Interference with Counsel

The Justice/Judge at trial should not deny Crown counsel the opportunity of calling witnesses and fully presenting his case.

Regina v. Viger (1958), 122 C.C.C. 159 (Ont. C.A.)

Similarly an accused or his counsel is entitled to call witnesses, present argument and otherwise make full answer and defence.

Right to Call Witnesses

The presiding Judge has the right to call a witness not called by the prosecution or the defence and without the consent of either, if, in his opinion, this course is necessary in the interests of justice.

The power should not be exercised where the defence has closed its case, except where something has arisen on the part of the accused/defendant *ex improviso*.

Regina v. Bouchard (1973), 12 C.C.C. (2d) 554 (N.S. Co. Ct.)

Questions by the Court

“It is, of course, always proper for a judge — and it is his duty — to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject. It must always be borne in mind that the judge does not know what is in counsel’s brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination. In cross-examination, for instance, experienced counsel will see just as clearly as the judge that, for example, a particular question will be a crucial one. But it is for counsel to decide at what stage he will put the question, and the whole strength of the cross-examination may be destroyed if the judge, in his desire to get what seems to him to be the crucial point himself intervenes and prematurely puts the question himself.”

Regina v. Pavlukoff (1953), 106 C.C.C. 249 at 257, 258 (B.C.C.A.)

“The nature and extent of a Judge’s participation in the examination of a witness is no doubt a matter within his discretion, a discretion which must be exercised judicially. I conceive it to be the function of the Judge to keep the scales of justice in even balance between the Crown and the accused. There can be no doubt in my opinion that a Judge has not only the right, but also the duty to put questions to a witness in order to clarify an obscure answer or to resolve possible misunderstanding of any question by a witness, even to remedy an omission of counsel, by putting questions which the Judge thinks ought to have been asked, in order to bring out or explain relevant matters: *Yuill v. Yuill*, [1945] 1 All E.R. 183. But neither that right or duty in my opinion extends to justify judicial participation in the examination of a witness of a nature which a jury could reasonably interpret as indicating a pre-disposition on the part of the Judge toward one side or the other.”

Rex v. Darlyn (1946), 88 C.C.C. 269 at 277 (B.C.C.A.)

“The law prohibits the Judge participating in the examination of witnesses where such participation is likely to indicate to the jury a predisposition in the Judge’s mind toward one side or the other. This would amount to the exercise of undue influence over the jury in the area of its own duties and jurisdiction.”

Regina v. Denis, [1967] 1 C.C.C. 196 at 202 (Q.Q.B. Appeal side)

The presiding Justice may question witnesses to clarify or further describe evidence adduced by counsel.

Regina v. Viger (1958), 122 C.C.C. 159 (Ont. C.A.)

The presiding Judge may ask questions of a witness which ought to be asked and have not on account of the failure of counsel.

Regina v. Torbiak and Campbell (1975), 18 C.C.C. (2d) 229 (Ont. C.A.)

A trial Judge should not cross-examine an unrepresented accused nor any accused so as to extract prejudicial admissions.

Regina v. McCormick (1961), 130 C.C.C. 196 (B.C.C.A.)

Stare Decisis

This established legal principle is applicable to Provincial Offences Courts whether a Justice of the Peace or a Provincial Court Judge is sitting.

See STARE DECISIS *infra* for a fuller explanation of the doctrine.

Functus Officio

A court has completed its duties after it has sentenced a defendant (except where the sentence is suspended) and is said to be *functus officio* at that point.

Laplane v. Court of Sessions of the Peace (1938), 69 C.C.C. 291 (Que. Sup. Ct.)

Any action by a judicial officer after such a point is a nullity.

Regina v. Conley (1979), 47 C.C.C. (2d) 359 (Alta. C.A.)

Conversely, the judicial officer can overturn his prior rulings on admissibility and procedural matters and in effect retrace his steps up to the pronouncement of sentence.

Regina v. Hunter (1981), 58 C.C.C. (2d) 190 (Ont. C.A.)

Further in exceptional circumstances, after an adjudication of guilt but before pronouncing sentence, a court may re-open proceedings to allow additional defence evidence and make another adjudication.

Regina v. Lessard (1977), 30 C.C.C. (2d) 70 (Ont. C.A.)

A court which dismisses a charge cannot re-open the proceeding.

Regina v. Lessard, *supra*.

If an otherwise valid sentence has been pronounced, any errors in the preparation of the documents such as an error in a date on a warrant of committal can be amended at any time to conform with the sentence imposed.

Regina v. Craig (1977), 37 C.R.N.S. 398 (B.C.S.C.)

Allowing Counsel to Present Argument

At a trial or any other judicial proceeding, the court must allow the defendant or his counsel an opportunity to present argument before an adjudication. The defendant cannot be deprived of this right to make full answer and defence.

Provincial Offences Act: Section 47(2)

Rex v. Bartlett (1950), 97 C.C.C. 100 (Ont. H.C.)

Regina v. Vickers (1959), 127 C.C.C. 315 (N.B.S.C.)

Aucoin v. The Queen, [1979] 1 S.C.R. 554 (S.C.C.)

Regina v. Gronka (1979), 45 C.C.C. (2d) 573 (Ont. C.A.)

If the judicial officer mistakenly renders a decision without allowing argument, he may

withdraw his earlier judgment and allow counsel an opportunity to then present argument before he reconsiders the judgment.

Rex v. Kovacevic (1951), 99 C.C.C. 258 (Ont. H.C.)

Crown counsel must be provided an opportunity to make submissions on the evidence before the court adjudicates.

Regina v. Jahn (1982), 66 C.C.C. (2d) 307 (Alta. C.A.)

Independent and Impartial

Justices of the Peace in Ontario are independent and impartial within the meaning of section 11(d) of the **Charter**.

Re Regina and Currie (December, 1984), unreported (Ont. C.A.)

NONSUITS

Introduction

This motion advanced by the defence is variously referred to as “no prima facie case”, “no evidence”, and “directed verdict” in the case of jury trials.

It is properly based upon no evidence — an absolute absence of evidence, direct or indirect, upon one or more of the essential elements of the offence. Such a motion ought to be made at the conclusion of the case for the Crown. This issue is a matter of law.

“I have always understood the rule to be that the Crown in a criminal case, is not required to do more than produce evidence which if unanswered and believed, is sufficient to raise a prima facie case upon which the jury might be justified in finding a verdict.”

Girvin v. The King (1911), 45 S.C.R. 167 per Fitzpatrick C.J. at 169.

However the quantity, quality or weaknesses of the evidence are not to be considered on such a motion. Those are matters which are to be dealt with only at the conclusion of the matter when reasonable doubt is the issue to be determined. This issue is a matter of law.

Sources

Tremear's Criminal Code pp. 805, 820, 1032-1033 and supplements.

Crankshaw pp. 682, 688, 853-4, 900-901, 1033.

Tests

The motion should not be granted if the Crown has introduced some relevant evidence although that evidence may not be enough to prove the case beyond a reasonable doubt. Reasonable doubt cannot be raised until the defence has either elected to call no evidence or has called all of its witnesses.

Rex v. Morabito (1949), 93 C.C.C. 251 (S.C.C.)

The Judge sitting alone hearing a nonsuit motion can consider only a total absence of evidence on one or more of the essential elements.

Regina v. Normandin (1971), 14 C.R.N.S. 262 (Que. C.A.)

The Judge on a nonsuit has only to consider whether there is evidence upon which a properly instructed jury acting reasonably might have convicted the accused.

Regina v. Paul (1976), 27 C.C.C. (2d) 1 (S.C.C.)

The Judge cannot grant a motion for a nonsuit because the evidence is unreliable. Reliability and credibility are not to be considered on the motion.

U.S.A. v. Sheppard (1976), 34 C.R.N.S. 207 (S.C.C.)

It is the task of the trial Judge to consider the evidence before him on the motion and to determine whether there is evidence upon which a properly instructed jury could convict the accused. The trial Judge is not to weigh the evidence and cannot arrive at a conclusion as to the guilt or innocence of the accused.

Bell v. The Queen (1983), 8 C.C.C. (3d) 97 (S.C.C.)

Trial Judge cannot consider the weight of the evidence by taking into account the effects of

cross-examination if there was any evidence upon which a properly instructed reasonable jury might convict.

Regina v. Carpenter (1982), 1 C.C.C. (3d) 149 (Ont. C.A.)

Procedure:

1. Defence motion should be made at the conclusion of the Crown's case.
2. Judge should determine the absence or presence of evidence and thereupon allow or disallow the motion.
3. Defence should then elect whether to call evidence.
4. At the conclusion of all the evidence, both defence if any and Crown, then the sufficiency of the evidence is argued, i.e., proof beyond a reasonable doubt.

Defence Election

After the defence has elected to call no evidence, and all the evidence is completed, the trial Judge ought to consider all the evidence and inferences to be drawn therefrom, in determining whether the charge has been proved beyond a reasonable doubt.

Rose v. The Queen (1959), 123 C.C.C. 175 (S.C.C.)

"... as the appellant was not put to his election whether he was going to call evidence, it would have been inappropriate for the trial judge to have applied his mind, at that stage of the proceedings, to the question of reasonable doubt."

Regina v. Syms (1979), 47 C.C.C. (2d) 114 (Ont. C.A.)

Crown May Reopen Case

If the defence moves for a nonsuit, the Crown may seek leave to reopen its case and call further evidence.

- F: Crown closed its case but omitted to prove P. was the driver of the automobile at the time of the accident. Defence moved for nonsuit (dismissal) before declaring that he would call no evidence.
- H: Crown's motion granted. "Having discovered that its evidence was incomplete, the Crown has a perfect right to complete it in order to bring the facts before the court. The motion for nonsuit cannot lie. Counsel for the defence could have declared that he had no evidence to offer and then he would have raised this question of lack of an essential element in his pleading . . . and then I would have been obliged to declare to the jury that this element was lacking."

Rex v. Perreault (1941), 78 C.C.C. 236 (Que. Superior Court — Criminal Assizes) per Langlais, J. at 237.

Also *Rex v. Gregoire* (1927), 47 C.C.C. 288 (Ont. C.A.)

Regina v. Cachia (1974), 17 C.C.C. (2d) 173 (Ont. H.C.)

This discretion to allow a reopening is not limited to matters which were inadvertently overlooked or which arose "ex improviso" "which no human ingenuity could have foreseen."

Robillard v. The Queen (1978), 41 C.C.C. (2d) 1 (S.C.C.)

Crown may be permitted to reopen its case even after the defence has elected to call no evidence and thereby closed its case if the reopening would be in the interests of justice and not unfair to the accused.

Regina v. Champagne et al., [1970] 2 C.C.C. 273 (B.C.C.A.)

Motion by Court

The judge should not on his own motion nonsuit Crown counsel but rather should leave it for counsel to move if he sees fit.

Rex v. Boyko (1945), 83 C.C.C. 295 (Sask. C.A.)

McKenzie et al., [1937] O.W.N. 200 (Ont. C.A.)

Co-accused Seeking Nonsuit

When two or more accused are jointly tried, each accused may independently apply for a nonsuit. If the particular accused is unsuccessful and then elects to call no evidence, the trial Judge should reserve the matter of reasonable doubt until the other accused have testified. A joint trial is not terminable by one of the accused persons at the conclusion of the Crown's case merely because he thinks it to be to his advantage not to run the risk of having damaging testimony given by his co-accused. If any accused gives evidence it takes effect against the other accused parties whom it may implicate.

Vanderbeek and Albright v. The Queen (1971), 2 C.C.C. (2d) 45 (S.C.C.)

Effect of Granting Motion

The granting of a nonsuit effectively terminates the matter and therefore involves a question of law which the Crown may appeal.

Rex v. Morabito (1949), 93 C.C.C. 251 (S.C.C.)

Regina v. O'Neill (1957), 119 C.C.C. 204 (N.B. Co. Ct.)

Regina v. Kyling (1971), 4 C.R.N.S. 257 (S.C.C.)

Circumstantial Evidence:

At the point of a nonsuit, if the evidence is circumstantial and neutral, that is it is open to a culpable or an innocent explanation, the rule in **Hodge's Case** is not to be considered.

Regina v. Senger (1955), 112 C.C.C. 351 (B.C.C.A.)

The rule in **Hodge's Case** has no application on a motion for nonsuit.

Regina v. Mackey, [1971] 3 O.R. 327 (Ont. C.A.)

Regina v. Paul (1976), 27 C.C.C. (2d) 1 (S.C.C.)

Regina v. Kavanagh (1972), 8 C.C.C. (2d) 296 (Ont. C.A.) leave to appeal to S.C.C. dismissed.

Examples Where Nonsuit Improperly Granted:

- F: Within an accused's room were found some eyedroppers and Kleenex which were analyzed as containing illegal drugs. Magistrate dismissed charge at the conclusion of Crown's case without calling upon the defence.
- H: These circumstances established a prima facie case which, in the absence of defence evidence, warranted a conviction.
Rex v. Olsen (1947-8), 4 C.R. 65 (B.C.C.A.) approved in
Rex v. Morabito (1949), 93 C.C.C. 251 (S.C.C.)
- F: Crown presented its case. Counsel for accused, while reserving the right to call witnesses, moved to dismiss the charge on the grounds that the Crown had not established beyond reasonable doubt that the accused had the care or control of a "motor vehicle" as defined. Magistrate dismissed the charge.
- H: Remitted for trial. "When counsel for the accused at the conclusion of the Crown's case

moved for a dismissal of the charge reserving the right to tender evidence if the motion were refused, the Magistrate should have refused to entertain the motion and should have called upon the accused to state whether he wished to produce evidence.”

Regina v. Smith (1957), 119 C.C.C. 227 (N.S.C.A.) per Parker, J. at 230, 231.

- F: Was evidence of accused with items of clothing in shopping cart, secreting them under her coat and leaving store after paying for other items. When arrested, the items fell from her coat. Case was dismissed without calling on the defence.
- H: “This procedure was clearly contrary to the principle laid down by the Supreme Court of Canada in *R. v. Morabito*, [1949] S.C.R. 172, 93 C.C.C. 251, [1949] 1 D.L.R. 609, where it was held that a Judge or Magistrate trying a case without a jury has the same power to acquit or convict as a jury, and can only decide in the first instance whether or not there is evidence upon which a jury may convict. The question of reasonable doubt does not arise at that stage. It was there held that in the light of the Crown’s evidence the case could not have been withdrawn from the jury, nor could it have been submitted to the jury until it was known that the evidence had been completed.

That principle is opposite in the circumstances of this case. We are unanimously of the opinion that there was ample evidence here to go to a jury, had the case been tried with a jury. It was not open to the Magistrate at that stage to determine the question of the appellant’s guilt or innocence. If he had called upon the accused for her defence and she or her counsel had elected not to call evidence it would then have been open to him to assess the evidence to determine guilt or innocence but not before. The contention of the Crown is entitled to prevail. The verdict of acquittal will be set aside and there will be an order directing a new trial before another Magistrate.”

Regina v. Pace, [1967] 1 C.C.C. 45 (Ont. C.A.) at 46, 47.

- F: Defence had argued for a nonsuit without electing to call evidence. Trial Judge had dismissed charge on basis of some doubt as to accused’s ownership of gun.
- H: New trial ordered. It was the duty of the Judge at this stage to ask himself whether there was or was not any evidence upon which a conviction could be registered and not to pass upon the merits of that evidence. The passing upon the merits is to be done only when the evidence as a whole is before the tribunal and includes an election by the defence not to call evidence.

Regina v. McConnery, [1970] 3 O.R. 427 (Ont. C.A.)

OFFENCE NOTICE

Introduction

The Offence Notice, like the Summary Conviction Traffic Ticket formerly in use, can be served upon a defendant immediately. This serves to bring the alleged infraction to the defendant's attention while it is still fresh in his mind. Therefore, technical requirements of sufficiency, wording and descriptive details are not required as in the case of an Information under the **Criminal Code**.

The Offence Notice can be issued only by a provincial offences officer who believes that an offence has been committed. Private individuals cannot resort to this procedure.

Provincial Offences Act

See Sections 3, 5, 6, 7, 9, 10, 13, 22(2), 90 and 133.

Sufficiency

The technical requirements of Informations and Indictments required by the **Code** do not apply to Uniform Traffic Tickets. The ticket must simply disclose sufficient information to notify the defendant of the offence bearing in mind that it is usually served immediately after the alleged offence.

Regina v. Sporning (1978), 42 C.C.C. (2d) 246 (Ont. H.C.)

It is sufficient if a traffic ticket designates the offence by means of an authorized abbreviated name, e.g., speeding, and initials to designate the statute contravened, e.g., **H.T.A.**.

Regina v. Lemieux (1982), 15 M.V.R. 126 (Ont. C.A.)

Signature of Issuing Officer

The failure of the provincial offences officer to sign the Offence Notice is an irregularity or defect in substance or form within the meaning of Section 90(1) and does not affect the validity of the proceedings.

Regina v. Elliot (1981), 12 M.V.R. 35 (Ont. C.A.)

Absence of Court and Judicial District

An Offence Notice which does not name the Judicial District and the Provincial Offences Court therein is valid although defective in form.

Regina v. Callahan (1983), 21 M.V.R. 127 (Ont. S.C.)

PLEAS

Introduction

Generally a defendant is entitled to plead guilty or not guilty. The latter plea includes the special pleas of *res judicata*, double jeopardy, *autrefois acquit*, *autrefois convict*, and multiple convictions which after a plea of not guilty ought to be separately raised and considered. The court should enter a plea of not guilty and proceed with the hearing of evidence when a defendant refuses to enter any plea.

The King v. McAuliffe (1906), 17 C.C.C. 495 (Ont. H.C.J.)

Finally, a plea of guilty should be clear and unequivocal. There can be no conditional plea of guilty.

Regina v. Durocher, [1963] 1 C.C.C. 17 (B.C.C.A.)

Regina v. Lucas (October 1983), unreported (Ont. C.A.) and (S.C.C.)

Provincial Offences Act

See sections 5, 7, 8, 10, 46 and 47.

Of Guilty

A plea of guilty is an admission of all the essential elements of the offence and dispenses with the necessity of proof of the ingredients.

Regina v. Lucas (October 1983), unreported (Ont. C.A.) and (S.C.C.)

The Justice may enter a conviction upon the plea alone. However, it is preferable that evidence or a summary thereof be put before the Justice to enable him to better assess culpability and sentence.

Regina v. Underhill (1955), 114 C.C.C. 320 (N.B.C.A.)

Adgey v. The Queen (1973), 23 C.R.N.S. 298 (S.C.C.)

A defendant upon a plea of guilty should be given an opportunity to accept, reject or explain the evidence of the circumstances or his previous convictions adduced by the prosecution.

Regina v. Doiron (1958), 124 C.C.C. 156 (N.B.C.A.)

The facts may be stated by the Crown or by an investigating officer but if challenged by the defence, it is then up to the Crown to prove beyond a reasonable doubt the material facts, for the purpose of assisting the court in deciding the appropriate sentence.

Regina v. Cieslak (1978), 37 C.C.C. (2d) 7 (Ont. C.A.)

Regina v. Gardiner (1982), 68 C.C.C. (2d) 477 (S.C.C.)

Withdrawal of Guilty Plea

A defendant may change his plea if he can satisfy the court that there are valid grounds for his being permitted to do so.

Regina v. Bamsey (1960), 125 C.C.C. 329 (S.C.C.)

The discretionary decision to either direct that a plea of not guilty be entered or to permit the accused to withdraw his original guilty plea and enter a new plea must be exercised judicially.

Thibodeau v. The Queen (1955), 21 C.R. 265 (S.C.C.)

Adgey v. The Queen (1973), 23 C.R.N.S. 298 (S.C.C.)

If the trial Judge chooses to conduct an inquiry after a plea of guilty has been entered, the evidence may indicate that the plea should not have been entered. The defendant will then be permitted to withdraw his plea of guilty and a plea of not guilty will be entered.

Adgey v. The Queen (1973), 23 C.R.N.S. 298 (S.C.C.)

Similarly a plea of guilty may be withdrawn at any time up to the imposition of sentence by the trial Judge.

Regina v. Kavanagh (1955), 114 C.C.C. 378 (Ont. C.A.)

After sentence, the trial Judge is *functus* and cannot allow a change of plea.

Regina v. Koop, [1958] O.W.N. 394 (Ont. C.A.)

Examples of Permitted Changes of Plea:

1. When an accused never intended to admit to a fact which is an essential ingredient of the offence.
Adgey v. The Queen (1973), 23 C.R.N.S. 298 (S.C.C.)
2. When a defendant misapprehended the effect of the plea of guilty or never intended to plead guilty at all.
Adgey v. The Queen, *supra*.
3. The facts disclosed by the Crown did not in law constitute the commission of an offence.
Regina v. Voorwinde (1976), 29 C.C.C. (2d) 413 (B.C.C.A.)
4. Accused under influence of drugs when plea entered.
Regina v. Kavanagh (1955), 114 C.C.C. 378 (Ont. C.A.)
5. Accused pleaded guilty on the advice of counsel although he had a defence of colour of right.
Regina v. Johnson (Dec. 8, 1976) unreported (Ont. C.A.)
6. Accused who suffered from delusions, showed bizarre behaviour and at times was not in contact with reality had pleaded guilty under erroneous belief he was about to be charged with a more serious offence.
Regina v. Hansen (1978), 37 C.C.C. (2d) 371 (Man. C.A.)
7. Accused pleaded guilty to possession of a narcotic which was later found to be a harmless sugar substitute.
Regina v. Laurie (1979), 42 C.C.C. (2d) 311 (N.S.C.A.)

Examples of Refusal to Allow Change of Plea:

1. Accused had pleaded guilty to robbery because he wanted to get it over with quickly.
Dore v. The Queen (1959), 125 C.C.C. 194 (Que. C.A.)
2. Accused pleaded guilty after his lawyer and his father, whose direction he necessarily followed, persuaded him to so plead against his original intentions.
Regina v. Sode (1975), 22 C.C.C. (2d) 329 (N.S.C.A.)
3. Plea on behalf of accused who spoke French was entered by his counsel. Crown adduced substantial evidence as to the circumstances without objection by accused.
Regina v. Leonard (1976), 29 C.C.C. (2d) 252 (Ont. C.A.)

To Included Offence

Section 46(4) of the **Provincial Offences Act** allows a defendant to plead not guilty to the offence charged but guilty to any other offence. This allows a plea to be entered to an offence which is not necessarily included in the charge. The prosecution should only consent to such a plea if there is an evidentiary basis and if it would be in the public interest to do so.

Guilty With An Explanation

A plea of guilty with an explanation should not be accepted unless the court is satisfied, after due inquiry that the qualification or condition does not derogate from the accused's intention to enter an unequivocal plea of guilty.

Regina v. McNabb (1971), 4 C.C.C. (2d) 316 (Sask. C.A.)

Under section 7 of the **Provincial Offences Act**, upon a plea of guilty being entered, a defendant may make submissions as to penalty. If during these submissions, evidence is given which derogates from the evidentiary basis of the offence, the guilty plea may, in certain circumstances be withdrawn and a trial date set at which the matters can be fully explored.

Previous Guilty Plea Admissible

If a defendant either personally or through counsel in his presence pleads guilty at trial that plea is admissible if relevant upon a subsequent trial after an appeal.

Regina v. Deitrich (1970), 1 C.C.C. (2d) 49 (Ont. C.A.)

Regina v. Gushue (No. 3) (1975), 30 C.R.N.S. 173 (Ont. Co. Ct.)

Regina v. Pentiluk and MacDonald (1975), 28 C.R.N.S. 324 (Ont. C.A.)

However, if a guilty plea is struck or allowed to be withdrawn because it was entered in error, e.g., accused didn't know the meaning of guilty, it is not admissible.

Thibodeau v. The Queen (1955), 21 C.R. 265 (S.C.C.)

Refusal to Accept Plea on Other Counts

A court should, unless the prosecution agrees otherwise, proceed on the most serious offence and hold any guilty plea on other counts in abeyance until a decision has been rendered on the major count.

Re Dauphney (1975), 29 C.C.C. (2d) 236 (B.C.S.C.)

Loyer v. The Queen (1978), 40 C.C.C. (2d) 291 (S.C.C.)

Guilty Plea Not to Mitigate

"It is also true that our own Court of Appeal, in the case of *Johnston and Tremayne*, held that a plea of guilty ought to be a mitigating factor, on different grounds — namely, that the community was saved a great deal of money, a great deal of trouble, when an accused man pleaded guilty.

As I understand the law, however, Mr. Harris, that is not necessarily a rule of universal application; and the effect of a plea of guilty is considerably diminished where an accused pleads guilty in circumstances where he's been inescapably caught. And I am of the view here that, in view of the identification evidence and the statements which you gave to the police, both you and Edwards were inescapably caught."

Regina v. Harris and Edwards (October 8 and 17, 1975), unreported, pp. 100-101 of judgment (Ont. Co. Ct.).

Appeal to Ont. C.A. dismissed February 20, 1976 with observation by Martin, J.A., that there was no error in principle.

Counsel May Plead

Section 50 of the **Provincial Offences Act** allows for counsel to appear and enter a plea on behalf of a defendant subject to the court's discretion to require the defendant to personally appear. This practice has been approved in Ontario.

Regina v. Dietrich (1971), 1 C.C.C. (2d) 49 (Ont. C.A.), application to S.C.C. dismissed (1971), 1 C.C.C. (2d) 68

Regina v. Trask (1975), 28 C.R.N.S. 321 (Ont. C.A.)

Autrefois Acquit

This defence is predicated upon a previous acquittal of the same or almost identical charge by a competent court. The previous acquittal must have been based on the same factual transaction and the defendant was at that time in danger of conviction for the substantially same offence which he is presently facing. The onus is upon the accused to establish the prerequisites.

Regina v. Feeley et al., [1963] 3 C.C.C. 201 (S.C.C.)

An accused may successfully plead autrefois acquit although there has not been a trial on the merits. He is in jeopardy from the point of his plea on, even if the charge is dismissed upon the calling of no evidence.

Regina v. Riddle (1980), 48 C.C.C. (2d) 365 (S.C.C.)

If the legal character of the previously charged and the presently charged offences is different, autrefois acquit will not succeed.

Regina v. Rinnie, [1970] 3 C.C.C. 218 (Alta. C.A.)

If the presently charged offence e.g., theft, is an included offence of the previously charged offence e.g., robbery, autrefois acquit will succeed.

If the presently charged offence e.g., assault causing bodily harm, is an aggravated version of the previously charged offence e.g., assault simpliciter, autrefois acquit will succeed.

Regina v. Hemmingway et al. (1972), 5 C.C.C. (2d) 127 (B.C. Co. Ct.)

When the Crown withdraws a charge and subsequently lays an identical charge later, autrefois acquit will not succeed.

Regina v. Karpinski (1957), 117 C.C.C. 241 (S.C.C.)

Re Blasko and The Queen (1976), 29 C.C.C. (2d) 321 (Ont. H.C.)

Bonli v. Gosselin, J. and A.G. of Saskatchewan (1982), 25 C.C.C. (3d) 303 (Sask. C.A.)

Autrefois Convict

As with autrefois acquit, the responsibility is upon the accused to establish that he was in actual jeopardy earlier on substantially the same charge. It is not important that the same facts will be led but whether he has previously been in danger of conviction for the same charge which he is presently facing.

See AUTREFOIS ACQUIT for applicable principles.

See Provincial Offences Act, Section 58(4) regarding proof of previous conviction.

Res Judicata

This defence also called “issue estoppel” requires the defendant to satisfy a court that a particular matter was determined in his favour in a previous trial and that earlier determination precludes the Crown from relitigating a point. It is based on an earlier judgment and will generally only arise where the judge at the previous trial gave reasons for his decision.

For example, when acquitted on an earlier trial for careless driving, a defendant could raise the plea of *res judicata* to a later charge of making an improper turn based on the same incident if the Justice at the first trial stated in his judgment that the defendant was not the driver at the time. However, if the Justice had simply acquitted the defendant without giving reasons, issue estoppel would not arise, unless it was clear that the case turned on only one issue since there could be many possible explanations for the acquittal — e.g., the defendant was driving but his conduct was not sufficiently negligent to constitute careless driving.

The defendant raising the matter must establish that at the earlier trial, the issue favourable to him can be isolated and that a finding in his favour is the only rational explanation of the verdict or judgment.

Gushue v. The Queen (1979), 50 C.C.C. (2d) 417 (S.C.C.)

Re MacDonald and Deputy A.G. of Canada (1981), 59 C.C.C. (2d) 203 (Ont. C.A.)

Regina v. Wright, [1965] 3 C.C.C. 160 (Ont. C.A.)

The principle does not apply to matters which arise during a trial, e.g., rulings on the admissibility of evidence.

Regina v. Duhamel (No. 2) (1982), 64 C.C.C. (2d) 538 (Alta. C.A.)

Kienapple Principle

This defence contains elements of the *res judicata* and *autrefois* principles however it has a broader scope because it concerns multiple simultaneous convictions rather than just prior adjudications and verdicts.

The Crown is entitled to charge and prosecute any number of offences arising out of the same single act. The principle does not arise until the point where a judicial determination is to be made.

A person cannot be convicted of two separate offences arising out of a single action or course of conduct if the separate offences differ only by virtue of some definitional ingredient, e.g., the age of the victim. That is, the two offences must be alternative to one another so that a person could be convicted of either on the same facts and thereby be punished twice for the same offence.

Kienapple v. The Queen (1975), 15 C.C.C. (2d) 524 (S.C.C.)

Regina v. Wildeman (1979), 42 C.C.C. (2d) 360 (Sask. C.A.)

Regina v. Haubrich (1978), 43 C.C.C. (2d) 190 (Sask. C.A.)

Some considerations as to whether the “**Kienapple** principle” applies are:

1. Whether the same cause or matter is comprehended by two or more offences.
2. Whether the elements of the offences are the same.
3. If a conviction of the first count would use up or extinguish the cause of action on the second count.
4. There must be a judicial determination against the accused on one of the charges before the principle arises.
5. A statutory intention which indicates that multiple convictions may result.
McGuigan v. The Queen (1982), 66 C.C.C. (2d) 97 (S.C.C.)
6. Determine whether the unlawful act can be separated as to:
 - (a) acts
 - (b) intentions
 - (c) elements
 - (d) penalties
 - (e) time periods

If the offences can be separated as described above, the **Kienapple** rule does not apply.

If the rule does apply, a conviction should be recorded on the most serious offence and the other offence dismissed.

PROSECUTOR

Introduction

The authority of the Attorney-General flows from the Royal Prerogative. He may delegate portions of his power to appointed agents who may then act on his behalf within the scope of their appointment.

Provincial Prosecutors

The **Crown Attorneys' Act**, Revised Statutes of Ontario, 1980, Chapter 107 provides as follows:

7. (1) The Attorney General may by order authorize persons appointed under the Public Service Act to be provincial prosecutors.
- (2) A provincial prosecutor may be a person who is not a member of the bar.
- (3) A provincial prosecutor shall act anywhere in Ontario as directed by the Director of Crown attorneys of the Ministry of the Attorney General. 1973, c. 134, s.1, part.
- (4) A provincial prosecutor shall conduct such prosecutions for provincial offences and offences punishable on summary conviction as are delegated to him by the Crown attorney for the county or provisional judicial district in which the provincial prosecutor acts and shall be subject to the direction and supervision of the Crown attorney. 1973, c. 134, s.1, part, revised.
- (5) Every provincial prosecutor before he enters upon his duties shall take and subscribe before a Crown attorney the following oath:

I swear that I will truly and faithfully, according to the best of my skill and ability, execute the duties, powers and trusts of provincial prosecutor for Ontario without favour or affection to any party: So help me God.

1973, c. 134, s.1, part.

11. Every Crown attorney and every provincial prosecutor is the agent of the Attorney General for the purposes of the **Criminal Code** (Canada). R.S.O. 1970, c. 101, s.11; 1972, c. 1, s.9(7); 1973, c. 134, s.2.

“Prosecutor” means the Attorney General or, where the Attorney General does not intervene means the person who issues a certificate or lays an Information and includes counsel or agent acting on behalf of either of them.

Provincial Offences Act s. 1(1)(h)

Crown Counsel's Authority

Counsel who act on behalf of the Crown are presumed to have the due and proper authority in the absence of evidence to the contrary. If his authority is challenged a letter received from the Attorney General or Deputy would probably be sufficient.

Lemay v. The King (1952), 102 C.C.C. 1 (S.C.C.)

Ex parte Karchesky, [1967] 3 C.C.C. 272 affirmed by S.C.C. at [1968] 4 C.C.C. 128

Regina v. Horncastle (1972), 8 C.C.C. (2d) 253 (N.B.C.A.)

Regina v. Cassidy (1975), 18 C.C.C. (2d) 1 (N.B.C.A.)

Regina v. Harrison (1977), 28 C.C.C. (2d) 279 (S.C.C.)

Duty of:

“It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

Boucher v. The Queen (1955), 110 C.C.C. 263 at 270 per Rand, J. (S.C.C.)

The conduct of a prosecutor is not that of an ordinary counsel. He is acting in a quasi-judicial capacity and ought to regard himself as part of the court and conduct himself accordingly, i.e., fairly and moderately.

Regina v. Durocher (1963), 41 C.R. 350 (B.C.C.A.)

Prosecutorial Discretion

The Crown prosecutor has the sole right to determine what charge(s) will be prosecuted. This discretion should not be interfered with by the judiciary.

Rex v. Stark (1927), 47 C.C.C. 356 (Ont. C.A.)

Regina v. Cooper (1977), 34 C.C.C. (2d) 18 (S.C.C.)

Regina v. Verrette (1978), 40 C.C.C. (2d) 273 at 291 (S.C.C.)

A Judge has a duty to try the charges before him and not substitute his own views as to what charge ought to be laid e.g., by substituting a lesser offence without consent of Crown.

Re Harvey (1957), 119 C.C.C. 124 (Ont. H.C.)

Personal Opinions

It is improper for Crown counsel or defence counsel to express a personal opinion as to the guilt, innocence or character of an accused. Further Crown counsel should not use inflammatory language in describing an accused's conduct.

Boucher v. The Queen (1955), 110 C.C.C. 263 (S.C.C.)

Regina v. Durocher (1963), 41 C.R. 350 (B.C.C.A.)

Denial of Crown's Right to Fair Trial

A Judge should not prevent the prosecution from calling its witnesses nor unduly interrupt the presentation of the case for the prosecution. “And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost”.

Jones v. National Coal Board, [1957] 2 Q.B. 55 per Lord Denning at 64 approved in *Regina vs. Viger* (1958), 122 C.C.C. 159 (Ont. C.A.)

The Judge has a duty to be impartial to the prosecution and should not interrupt the Crown's case to the point of impeding it.

Regina v. Lafontaine (1979), 9 C.R. (3d) 263 (Que. S.C.)

Calling of Witnesses

The prosecution has a discretion as to which witnesses it will call and it will not be interfered with unless exercised for some oblique motive. The prosecution must not hold back evidence because it may assist the defendant however it does not have to call all persons who may be able to offer some evidence. The number and materiality of the witnesses is a matter for the prosecution and it should not discharge the functions of both the prosecution and defence.

Lemay v. The King (1951), 102 C.C.C. 1 (S.C.C.)

Stay of Proceedings

The Attorney General or his agent may stay a proceeding at anytime before judgment. The proceeding may be recommenced with the consent of designated persons if within time. There is no need to prove an instruction was granted by the Attorney General personally. The direction to stay is made to the clerk of the court who has no discretion but to accept it, not to the judge.

Provincial Offences Act: Section 33

Regina v. McKay (1979), 9 C.R. (3d) 378 (Sask. C.A.)

After a stay of proceedings has been entered, a new identical Information may be laid and proceeded with.

Regina v. Judge of the Provincial Court, Ex parte McLeod, [1970] 5 C.C.C. 128 (B.C.S.C.)

SEVERANCE OF COUNTS

Introduction

The common law right of the Crown to include any number of counts in a single information is subject to a court's authority to order that a defendant be tried separately upon one or more counts. It is advantageous to charge and try as many offences as the evidence will support and thereby avoid multiplicity of proceedings which result in greater time, cost and increase the chances of inconsistent verdicts.

A separation is of obvious benefit to a defendant who wishes to present inconsistent defences to the charges.

The principles of severance of counts parallel and often duplicate those related to severing defendants and the cases concerning the latter should be consulted.

Finally, the policy of the **Criminal Code** and seemingly more so the **Provincial Offences Act** is to avoid unnecessary multiple proceedings.

Regina v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.)

Provincial Offences Act

See subsection 39(2)

Test

The court may, before or during the trial order the counts to be tried separately where it is satisfied that the ends of justice so require.

The "ends of justice" embrace both the interests of the accused and the interests of the administration of justice.

Regina v. Racco (No. 1) (1975), 29 C.R.N.S. 303 (Ont. Co. Ct.)

Onus

The onus is on the defendant to show, on a balance of probabilities that the ends of justice require separate trials.

Regina v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.)

Discretionary Order

The severance of counts is an exercise of judicial discretion which will not be interfered with on appeal unless the refusal resulted in manifest prejudice to a defendant.

Regina v. Henshaw, [1968] 3 C.C.C. 350 (B.C.C.A.)

Regina v. Kestenberg and McPherson (1959), 126 C.C.C. 387 (Ont. C.A.)

Conspiracy Joined to Substantive Counts

If the evidence of the conspiracy is referable only to the substantive offences, the court may require the Crown to proceed on either the conspiracy or the other offences at the first trial.

Regina v. Jefferson et al. (1972), 6 C.C.C. (2d) 33 (Ont. H.C.)

Where the conspiracy charge is supported by evidence going beyond the performance of the substantive offences, the conspiracy and the substantive offences need not be separated.

Regina v. Graham et al. (1954), 108 C.C.C. 153 (B.C.C.A.)

Grounds For Seeking Separation:

1. Evidence on one count is not admissible on another.

Reply — it is the trial judge's duty and function to separate evidence and apply the evidence on one count while disregarding other evidence.

Rex v. Morgan et al. (1947), 90 C.C.C. 1 (Ont. C.A.)

2. Volume of evidence would place an unwarranted strain on the court.

Reply — the ordering of separate trials would not effectively abbreviate the trial inasmuch as the evidence on the severed counts could be called and would be admissible as similar acts on the main trial.

Regina v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 193 at 264-266 (Ont. C.A.)

3. Evidence against another accused charged in a separate count would be prejudicial to primary accused.

Reply — the trial judge is able to separate evidence and apply it only to the appropriate accused.

Regina v. Kestenberg and McPherson (1959), 126 C.C.C. 387 (Ont. C.A.)

Additional Grounds to Refuse Application:

1. There is a nexus in time, place or method of commission of the various offences.

Regina v. C.G.E. Ltd., et al. (1974), 17 C.C.C. (2d) 445 (Ont. H.C.J.)

Regina v. Racco (No. 1) (1975), 29 C.R.N.S. 303 (Ont. Co. Ct.)

2. The evidence to be given is properly admissible as similar act upon each of the other counts.

Regina v. Hatton (1978), 39 C.C.C. (2d) 282 (Ont. C.A.)

Regina v. McNamara et al. (1981), 56 C.C.C. (2d) 193 (Ont. C.A.)

SEVERANCE OF DEFENDANTS

Introduction

It has long been settled that where several persons join in the commission of an offence, all or any number of them may be jointly charged and should prima facie be tried together at a single trial.

Regina v. De Tonnancourt (1956), 115 C.C.C. 154 at 182-184 (Man. C.A.)

Regina v. Lane and Ross (1969), 6 C.R.N.S. 273 (Ont. S.C.)

The issue is simply put that the court ought to hear the whole story at one time rather than receive only a partial picture thereby limiting the evidentiary basis upon which its judgment will be based.

Rex v. Gibbons and Proctor (1918), 13 Cr. App. R. 135 (Eng. C.C.A.)

Provincial Offences Act

See subsection 39(2)

Test

A defendant may be granted a separate trial if he satisfies the court that the ends of justice so require. The Judge must consider the interests of justice as well as the interests of the defendants.

Rex v. Grondowski and Malinowski (1946), 31 Cr. App. R. 116 (Eng. C.C.A.)

Matter of Discretion

A defendant has no absolute right to a separate trial. The order is a matter of discretion which must be exercised judicially.

The Queen v. Weir and others (No. 4) (1899), 3 C.C.C. 351 (Que. Q.B.)

Regina v. Kestenberg and McPherson (1959), 126 C.C.C. 387 (Ont. C.A.)

Regina v. Quiring and Kuipers (1975), 19 C.C.C. (2d) 337 (Sask. C.A.) appeal to S.C.C. dismissed November 4, 1974.

Application to Trial Judge

An application for a separate trial must be made to the trial Judge and not to a Judge in chambers.

Regina v. Auld and Auld (1957), 26 C.R. 266 (B.C.C.A.)

The application should be made before the trial commences however it may be made during the trial if a refusal to grant it would result in a miscarriage of justice.

Regina v. Cassidy and Letendre, [1963] 2 C.C.C. 219 (Alta. C.A.)

Common Enterprise

Where the essence of the case is that the defendants were engaged in a common enterprise, they should be tried together. Therefore partners or parties in an unlawful act should not be separated.

Rex v. Grondowski and Malinowski (1946), 31 Cr. App. R. 116 (Eng. C.C.A.)

Regina v. Agawa and Mallet (1975), 28 C.C.C. (2d) 379 (Ont. C.A.)

Regina v. McNamara et al. (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.)

Grounds Advanced For Separate Trials

1. Accused have antagonistic defences, i.e., each will attempt to blame other.
 Reply — the fact that one accused blames the other is only a factor to be taken into account.
 Rex v. Gibbons and Proctor (1918), 13 Cr. App. R. 135 (Eng. C.C.A.)
 Regina v. Cassidy and Letendre, [1963] 2 C.C.C. 219 (Alta. C.A.)
2. One accused is claiming that other coerced him into committing the offence.
 Reply — it would not be proper to separate accused and deprive the court from assessing the appearance of the brute.
 Rex v. Grondowski and Malinowski (1946), 31 Cr. App. R. 116 (Eng. C.C.A.)
3. Evidence, e.g., a statement of one accused which would not be admissible against other accused on a separate trial, would be admitted on joint trial and thereby prejudice other accused.
 Reply — It is the duty and function of the trial Judge to separate evidence and apply certain evidence only to certain accused.
 Rex v. Christie (1914), 10 Cr. App. R. 141 (Eng. C.C.A.)
 Regina v. Cassidy and Letendre, [1963] 2 C.C.C. 218 (Alta. C.A.)
 Regina v. Emkeit and 12 others (1971), 3 C.C.C. (2d) 309 (Alta. C.A.)
 Regina v. Starr et al., [1965] 3 C.C.C. 138 (Man. Q.B.)
4. That one of the defendants, if severed, could give evidence for other defendant, that is the severed defendant would be competent and compellable for the defence on a separate trial.
 Reply — the **Canada Evidence Act** and the **Canadian Charter of Rights** provide sufficient protection for any accused who may wish to testify. Further, a severed accused may be more widely cross-examined as to previous inconsistent statement — e.g., a confession and to matters of credibility than on a joint trial.
5. Not all accused persons are charged with all the same counts.
 Reply — it is the duty of trial Judge to separate the evidence and apply it to each individual accused.
 Rex v. Morgan et al. (1947), 90 C.C.C. 1 (Ont. C.A.)
 Regina v. Kestenberg and McPherson (1959), 126 C.C.C. (Ont. C.A.)

Additional Grounds Against Separate Trials:

1. The usual grounds for severance, given in **The Queen v. Weir (No. 4)** (1899), 3 C.C.C. 351 (Que. Q.B.), although referred to frequently are not rules of law but only matters to be considered on the motion. Modern juries (and therefore Judges) are capable of sorting evidence and applying it according to the rules of admissibility of evidence.
 Regina v. Lane and Ross (1969), 6 C.R.N.S. 273 (Ont. S.C.)
2. The granting of separate trials may lead to a miscarriage of justice when two separate courts arrive at different verdicts upon the same evidence.
 Regina v. Lane and Ross (1969), 6 C.R.N.S. 273 (Ont. S.C.)
3. Since 1974, in Ontario, an accused may cross-examine a co-accused who testifies whether

the latter's evidence is favourable or unfavourable to the accused. This right of cross-examination is wider than the scope of cross-examination by an accused of other witnesses.

Regina v. McLaughlin (1974), 15 C.C.C. (2d) 562 (Ont. C.A.)

STARE DECISIS

Introduction:

“It is of great importance that there should be a stability in the administration of the law, both civil and criminal, and that the uncertainty of criminal trials should not be increased by a diversity of views among trial Judges as to what the law is. If one man is condemned because one Judge has one view of the law and the next man is set at liberty because another Judge differs from his brother Judge as to the law, the administration of the criminal law will tend to become chaotic and the criminal law, which should be certain, will lose much of its certainty. The wide rights of appeal that exist in all civil and criminal cases are ample to protect the liberty of the subject in case a prior decision should be wrong.”

Regina v. Northern Electric Co. Ltd., et al. (1955), 111 C.C.C. 241 per McRuer, C.J.H.C. at 259 (Ont. H.C.)

It should be noted that for a Part III **P.O.A.** appeal, a District Court Judge hearing an appeal from a Provincial Court Judge is of co-ordinate jurisdiction with a Provincial Court Judge hearing an appeal from a Justice of the Peace.

Provincial Offences Act: Section 99

Defined

A doctrine that when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases where the facts are substantially the same . . . (The decision) is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy . . .

Black's Law Dictionary, Revised Fourth Edition, pp. 1577-1578.

Superior and Co-ordinate Courts

“. . . the trial Judge is, of course, bound by the decision in point, of a Court of higher jurisdiction, and also of a Court of co-ordinate jurisdiction except in the most special circumstances. The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock says, in his First Book of Jurisprudence, 6th ed., p. 321: “The decisions of an Ordinary Superior Court are binding on all courts of inferior rank within the same jurisdiction, and, though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary.” ”

Rex ex rel. McWilliam v. Morris, [1942] O.W.N. 447 at 448, 449 per Hogg, J. (Ont. H.C.J.)

“I think that “strong reason to the contrary” does not mean a strong argumentative reason appealing to the particular Judge, but something that may indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. I do not think “strong reason to the contrary” is to be construed according to the flexibility of the mind of a particular Judge.”

Regina v. Northern Electric Co. et al. (1955), 111 C.C.C. 241 per McRuer, C.J.H.C. at 259 (Ont. H.C.J.)

“In my view the Provincial Judge totally misconceived his role and his duty. It was not for him to do anything but obey the instructions of the County Court Judge sitting in appeal from his judgment. He had no right to question the jurisdiction of a superior court. If that court were considered to have acted without jurisdiction the remedy was

an appeal to the Court of Appeal. The rule of law is not only for citizens; it is for judges as well. It is our obligation to obey the law, not to foment judicial anarchy. The principles of stare decisis require us to follow the judgment of superior courts. There may be room for distinction, for discretion, for manoeuvre if you will, when considering precedents established by superior courts in other cases. There is none whatever when a judge receives a direct order in the case at bar.”

Regina v. Rybansky et al. (1982), 26 C.R. (3d) 91 (Ont. S.C.)

Court of Appeal

The Ontario Court of Appeal is not bound by a previous decision of the same court where the liberty of the subject is involved and the court is convinced that the previous decision was wrongly decided.

Regina v. Santeramo (1976), 32 C.C.C. (2d) 35 (Ont. C.A.)

The Ontario Court of Appeal considers itself bound by its own decisions favouring the liberty of the subject.

Regina v. Maika (1974), 27 C.R.N.S. 115 (Ont. C.A.)

Courts lower than the Ontario Court of Appeal are bound by rulings of that court even though the particular ruling was not necessary to dispose of the appeal.

Re McKibbin and The Queen (1981), 61 C.C.C. (2d) 126 (Ont. H.C.J.)

While the Ontario Court of Appeal is not obligated to follow a judgment of another provincial appellate court unless persuaded to do so on its merits or for other independent reasons, however the integrity of the administration of the criminal law in this country requires that careful heed be given to it.

Regina v. Czipps (1979), 48 C.C.C. (2d) 166 (Ont. C.A.)

Supreme Court of Canada

When the Supreme Court of Canada expresses an opinion on a point of law, then such ruling is binding on the lower courts even though this ruling was not strictly necessary to dispose of the appeal.

Sellars v. The Queen (1980), 52 C.C.C. (2d) 345 (S.C.C.)

WITHDRAWAL OF CHARGES

Introduction

Although the **Criminal Code** contains no provision to withdraw charges, the **Provincial Offences Act** recognizes the longstanding practice of Crown counsel in withdrawing charges. The right of the Attorney General or his agents to withdraw charges is an exercise of discretion with which the courts are reluctant to interfere.

Regina v. Leonard, Ex parte Graham (1962), 133 C.C.C. 230 (Alta. S.C.)

Regina v. Dick, [1969] 1 C.C.C. 147 (Ont. S.C.)

Provincial Offences Act

See Section 33

Crown Only to Withdraw

The court cannot withdraw charges; that is the function of Crown counsel only.

Regina v. Garcia and Silva, [1970] 3 C.C.C. 124 (Ont. C.A.)

“I would point out the refusal of the trial Judge to permit a withdrawal of the original Information for assault before any evidence is adduced is an usurpation by the Court of the administrative function of the Crown prosecutor and the Attorney-General to determine who and for what offence any person should be prosecuted. Case law clearly indicates the Courts should distinguish between private prosecutions and those carried on by the Crown. They show the Courts should not interfere with the administration of justice by making the matter of withdrawal a means of controlling the Crown’s discretion to prosecute and thereby bring the executive and judicial branches of government into conflict. They point out and emphasize that the business of withdrawals is strictly that of the Attorney-General or his agents before the Court. They equate the right of withdrawal to the right to grant a stay of proceedings. The Crown prosecutor is in a better position than the Judge to know how serious any particular case is. Further the prosecutor is the representative of The Queen and it is inconceivable the Court should refuse the right of Her Majesty to withdraw an Information or stay a prosecution.”

Regina v. Osborne (1976), 25 C.C.C. (2d) 405 at 411, 412 (N.B.C.A.)

Prior to Plea

The Crown has an absolute right to withdraw a charge prior to plea.

Re Forrester and The Queen (1977), 33 C.C.C. (2d) 221 (Alta. S.C.)

Re Blasko and The Queen (1976), 29 C.C.C. (2d) 321 (Ont. H.C.J.)

Regina v. Banton (June 16, 1976), Unreported (Ont. C.A.)

After Plea

The Crown may withdraw a charge after plea only with leave of the court.

Regina v. Hatherley (1971), 4 C.C.C. (2d) 242 (Ont. C.A.) leave to appeal to S.C.C. refused.

After the entering of a plea and the tendering of evidence, the charge can be withdrawn only with the consent of the trial Judge.

Re Blasko and The Queen (1976), 29 C.C.C. (2d) 321 (Ont. H.C.J.)

Effects of a Withdrawal

A withdrawal after a plea but before evidence is tendered does not amount to an adjudication whereby autrefois acquit could succeed.

Re Bond (1936), 66 C.C.C. 271 (N.S.S.C.)

Regina v. Karpinski (1957), 117 C.C.C. 241 (S.C.C.)

Regina v. Osborne (1976), 25 C.C.C. (2d) 405 (N.B.C.A.)

Bonli v. Gosselin, Prov. J., and A.G. of Sask. (1982), 25 C.R. (3d) 303 (Sask. C.A.)

When a charge is withdrawn against one accused, he may be compelled to testify against the remaining accused.

Regina v. Dick, [1969] 1 C.C.C. 147 (Ont. S.C.)

Once a charge is withdrawn, the court is without jurisdiction to proceed any further on the matter.

Re Blasko and The Queen (1976), 29 C.C.C. (2d) 321 (Ont. H.C.J.)

Compared to a Stay of Proceedings:

“The terms “stay of proceedings” and “withdraw a charge” are not synonymous. When a charge has been withdrawn, there is no charge on record, and in order to continue the prosecution a new charge would have to be laid. Withdrawing a charge has the effect of ending the proceedings. When a stay has been entered however, the Crown can at any future time continue the proceedings without laying any charge. Entering a stay of proceedings has the effect merely of suspending them.”

Regina v. Leonard Ex parte Graham (1962), 133 C.C.C. 230 at 233 (Alta. S.C.)

YOUNG OFFENDERS

Introduction

With the proclamation of the **Young Offenders Act (R.S.C.)** it became necessary for the Province to legislate in relation to young persons from twelve years to under sixteen years of age. This was accomplished by amendments to the **Provincial Offences Act**, the **Courts of Justice Act** and the **Unified Family Court Act**. Young persons will be tried by Judges of the Provincial Court (Family Division) and of the Unified Family Court.

Process

A Part I Offence Notice is not available for a young person. This necessitates a court appearance with parental involvement usually. This is enhanced by the need to notify parents of the charge and the prohibition against proceeding ex parte in the case of young persons.

Arrest

If a provincial statute allows for the arrest of an adult, a young person may be arrested without warrant where it is necessary to establish the identity of the young person or to prevent the continuation or repetition of an offence that seriously endangers the young person or the person or property of another. The young person shall be released unless the grounds for arrest continue in which case a bail hearing must be held.

Notice to Parents

Notice should be given to a parent of the young person or an adult with whom the young person ordinarily resides when a summons is issued or when a bail hearing is held. Notice may be dispensed with in some circumstances.

Sentence Options

In proceedings commenced by Certificate of Offence the possible dispositions are fines of three hundred dollars or the set fine, whichever is less, a probation order not exceeding three months or an absolute discharge.

In proceedings commenced by a Part III Information, the possible dispositions are a fine not exceeding one thousand dollars, a probation order not exceeding one year and an absolute discharge.

No custodial sentences are available for young persons.

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ABSOLUTE LIABILITY

Introduction

This category of public welfare offence was used interchangeably with “strict liability” prior to 1978. In **Regina v. Sault Ste. Marie** the Supreme Court of Canada separated and defined three categories of offences, namely: (1) mens rea offences, (2) strict liability offences and (3) absolute liability offences.

The rationale underlying all public welfare offences is the need to protect the public from dangers by imposing certain standards of operation upon those who carry on potentially harmful activities.

The prosecution must only show that the defendant did the proscribed act and it is not open to the accused to exculpate himself by showing that he was free of fault.

Defined

“... absolute liability entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.”

Regina v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 at 362 (S.C.C.)

“Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act.”

Regina v. Sault Ste. Marie, supra at 374

Test

Courts should be reluctant to find that a statute gives rise to an absolute liability offence especially when the penalty is of any consequence. Mere difficulty of prosecution or enforcement is not sufficient to move a prima facie strict liability offence into the absolute liability category. The over-all regulatory pattern adapted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the absolute liability category.

Regina v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.)

Regina v. Chapin (1979), 45 C.C.C. (2d) 333 (S.C.C.)

Wording of Absolute Liability Offence

A statute which uses words such as “shall be deemed to be in contravention” indicates an absolute liability offence but the words “shall ensure” are not clear enough to indicate absolute liability.

Regina v. Z-H Paper Products Ltd. (1979), 27 O.R. (2d) 570 (Ont. Div. Ct.)

Example of Absolute Liability Offence

Failing to stop for a stop sign contrary to the **Highway Traffic Act**, R.S.O. is an absolute liability offence.

Regina v. Walker (1980), 48 C.C.C. (2d) 126 (Ont. Co. Ct.)

ABUSE OF PROCESS

Introduction

This rather vague theory which has always existed in civil law received recognition in England in 1964 when it was mentioned in a criminal matter, namely **Connelly v. D. P. P.**, [1964] A.C. 1254 (H. of L.) which dealt with successive prosecutions of the same accused.

The Supreme Court of Canada appeared to limit or even extinguish the doctrine in 1977 in **Rourke v. The Queen** (1978), 35 C.C.C. (2d) 129, although it has been periodically revived by lower courts as a means of preventing prosecutions which are seen as oppressive and in forcing Crown counsel to comply with undertakings or fairly exercise other non statutory powers.

Sources

Case References on Abuse of Process by Manfred Angene (1977), 3 C.R.N.S. 153-226.

Defined

“The cases use such adjectives as vexatious, unfair, oppressive and now “most exceptional circumstances” in describing conduct deemed to be an abuse of process”.

Re Abitibi Paper Co. Ltd. and The Queen (1979), 47 C.C.C. (2d) 487 at 496 (Ont.C.A.)

It is a means of controlling the behaviour of the prosecution which conduct actually prejudices an accused person. It is an inherent power which a court possesses to prevent abuses of its process and to control its own procedure which includes a power to safeguard an accused person from oppression or prejudice.

It does not allow a court to control prosecutions nor police departments who may for valid reasons delay in laying a charge against a particular accused.

Rourke v. The Queen (1977), 35 C.C.C. (2d) 129 (S.C.C.)

Timing of Motion

The proper time to seek this jurisdiction is before arraignment on the charge which is claimed to be oppressive, not after a trial on the merits.

Regina v. Osborn, [1969] 4 C.C.C. 185 (Ont. C.A.) reversed on other grounds (1971), 1 C.C.C. (2d) 482 (S.C.C.)

Procedural Steps:

1. First, the court must determine from evidence led that factually an abuse has occurred.
2. Then the determination that the particular court hearing the application has inherent jurisdiction to enter a stay must be made.

Application to Provincial Offences

If the doctrine is presently available at all, it seems that in Ontario it applies to provincial offences because they have been characterized as matters of civil law and therefore clearly subject to this power.

Re Abitibi Paper Co. Ltd. and The Queen (1979), 47 C.C.C. (2d) 487 (Ont. C.A.)

However, the above categorization is contrary to many other authorities and it has been

suggested is unsupportable.

See Ontario Provincial Offences Procedure, Drinkwater and Ewart, 1980 Carswell Co. Ltd. Toronto, pp. 12-18.

In provinces other than Ontario only a superior court which has inherent jurisdiction can order a stay of proceedings.

Re Regina v. Lizee (1979), 42 C.C.C. (2d) 173 (B.C.S.C.)

Re Regina v. Lebrun (1979), 45 C.C.C. (2d) 300 (B.C.C.A.)

Re Young et al. and The Queen (1981), 60 C.C.C. (2d) 252 (Sask. Q.B.)

Effects of a Finding

The usual result if an abuse of process is found, is for the proceedings to be ordered stayed.
Re Abitibi Paper Co. Ltd. and The Queen (1979), 47 C.C.C. (2d) 487 (Ont. C.A.)

Examples Where Abuses Found

Some of the following which predated the **Rourke** decision may no longer be valid.

A rape victim failed to appear in court on several occasions and thereby added to an already lengthy resolution of the charge.

Regina v. Falls and Nobes (1976), 26 C.C.C. (2d) 540 (Ont. Co. Ct.)

See also Re Barnett and The Queen (1974), 17 C.C.C. (2d) 108 (B.C.S.C.)

When criminal courts are used to enforce a civil claim or to collect a debt.

Rex v. Leroux (1928), 50 C.C.C. 52 (Ont. C.A.)

Rex v. Bell (1929), 51 C.C.C. 388 (B.C.C.A.)

Regina v. Leclair (1956), 115 C.C.C. 297 (Ont. C.A.)

During negotiations with a corporation concerning pollution matters an agreement was apparently reached with the Ministry of the Environment that would have precluded charges. The company in reliance on this agreement satisfactorily completed much of the pollution abatement programme when numerous pollution charges were laid in breach of the undertaking not to prosecute.

Re Abitibi Paper Co. Ltd. (1979), 47 C.C.C. (2d) 487 (Ont. C.A.)

Accused was induced by agent provocateur to traffic in narcotics.

Regina v. Shipley, [1970] 3 C.C.C. 398 (Ont. Co. Ct.)

contra Regina v. Ormerod, [1969] 4 C.C.C. 3 (Ont. C.A.)

contra Regina v. Chernecki (1971), 4 C.C.C. (2d) 556 (B.C.C.A.)

Eskimo transported approximately one thousand miles to face charge of causing a disturbance by being drunk. He was deprived of his witnesses and was not released prior to trial until a residence could be located.

Regina v. Ittoshat (1970), 10 C.R.N.S. 385 (Que. Sessions of the Peace)

A delay of over two years between the preliminary hearing and the trial. Had been some discussion between Crown and defence counsel about withdrawing the charge.

Regina v. Thorpe (1973), 11 C.C.C. (3d) 502 (Ont. Co. Ct.)

Accused who was promised immunity if he turned over the illicit drugs was subsequently prosecuted for conspiracy based on conversations with Crown counsel and drugs turned over.

Re Smith and The Queen (1975), 22 C.C.C. (2d) 268 (B.C.S.C.)

Juvenile appeared numerous times in court and the Crown laid new Information after a

dismissal for want of prosecution when a requested adjournment by the Crown was refused almost year after offence.

Regina v. K. (1972), 5 C.C.C. (2d) 56 (B.C.S.C.)

Federal Crown agreed with Postal Union not to prosecute workers for criminal offences committed during strike. Accused postal worker charged with assault.

Regina v. Betesh (1975), 30 C.C.C. (2d) 233 (Ont. Co. Ct.)

Examples Where Abuse Not Found

These cases may also not be valid now in view of the **Charter** and **Rourke**. Accused after acquittal of possession of cheques intended to be used for forgery was then charged with conspiracy to utter the same cheques.

The Queen v. Osborn (1971), 1 C.C.C. (2d) 482 (S.C.C.)

Crown stayed charges after being refused adjournment in order to serve accused with notice under the **Evidence Act**. Charges were relaid.

Regina v. Babcock (1978), 4 C.R. (3d) 105 (B.C. Prov. Ct.)

Crown after seeking two adjournments withdrew a charge on peremptory trial date because essential witness was unavailable. When the witness was located, an identical charge was relaid.

Re Ball and The Queen (1979), 44 C.C.C. (2d) 532 (Ont. C.A.), leave to appeal to S.C.C. dismissed 25 N.R. 608.

Accused was not charged until approximately a year and one half after the offence and was available throughout that period.

Rourke v. The Queen (1977), 35 C.C.C. (2d) 129 (S.C.C.)

Crown refused adjournment due to unavailability of witness and therefore stayed charges. Charges were relaid.

Regina v. Lizée (1978), 4 C.R. (3d) 115 (B.C.S.C.)

Crown delayed in complying with undertaking to produce recordings of taped conversations.

Regina v. Rowbotham (No.2) (1978), 2 C.R. (3d) 222 (Ont. Co. Ct.) and 236 (Ont. S.C.)

Accused was to be tried for third time on same evidence after a mistrial and hung jury.

Re Regina v. Carpenter (1972), 5 C.C.C. (2d) 28 (Ont. H.C.)

Regina v. Myles (No. 2) (1972), 18 C.R.N.S. 84 (N.S. Prov. Ct.)

Accused charged with trafficking and at trial Crown withdrew original charge and laid new Information which corresponded with Superior Court decision requiring analyst to give oral evidence.

Regina v. Kowarchuk (1972), 5 W.W.R. 255 (Alta. S.C.)

Were three successive Informations laid on same facts and almost a dozen court appearances over several months.

Re Vroom and Lacey and The Queen (1974), 14 C.C.C. (2d) 10 (Ont. H.C.)

An appeal by the Crown of an acquittal.

Regina v. Osborn (1971), 1 C.C.C. (2d) 482 (S.C.C.)

Re Regina and Croquet (1972), 8 C.C.C. (2d) 241 (B.C.S.C.)

Regina v. Georgia Strait Pub. Co. and McLeod, [1970] 5 C.C.C. 31 (B.C. Co. Ct.)

Accused charged with criminal negligence causing death and impaired driving, pleaded to latter and former withdrawn. Husband of deceased reinstituted criminal negligence charge.

Regina v. Kennedy (1972), 6 C.C.C. (2d) 564 (Ont. C.A.)

Crown in order to obtain adjournment stays charge in order to have the accused examined psychiatrically. Charges then relaid.

Regina v. Atwood (1972), 8 C.C.C. (2d) 147 (N.W.T. Terr. Ct.)

Crown appealed by trial de novo after agreeing to acquittal at trial after essential certificate evidence ruled inadmissible.

Re Regina and Croquet (1972), 8 C.C.C. (2d) 241 (B.C.S.C.) affirmed (1973), 12 C.C.C. (2d) 331 (B.C.C.A.)

Accused charged with selling short weight fowl approximately five months after the offences.

Regina v. Acme Products; Regina v. Muttner (1972), 8 C.C.C. (2d) 114 (Man. C.A.)

Accused charged by wife with abducting his own son contrary to a valid Court Order awarding custody to wife. The criminal charge was followed by a civil contempt proceeding which was dismissed.

Regina v. Kehoe (1974), 21 C.C.C. (2d) 544 (Ont. Prov. Ct.)

Accused who had been issued Summons after an invalid Appearance Notice did not appear in court and was arrested on a bench warrant.

Regina v. Benteau (1976), 24 C.C.C. (2d) 96 (Ont. H.C.J.)

On a date set for argument as to the duplicity of a charge, the Crown did not appear and charge was dismissed. Another charge subsequently laid.

Regina v. Neish (1976), 24 C.C.C. (2d) 379 (Alta. C.A.)

Second Information was sworn to after first lapsed due to defects in promise to appear. Second Information was proceeded with by indictment since beyond six month time limit.

Regina v. Currie (Released July 5, 1983), unreported (Ont. S.C.)

Attorney General preferred a direct indictment after accused discharged at preliminary hearing.

Balderstone v. Regina and A.G. of Manitoba (September 12, 1983), unreported (Man. C.A.)

Previous P.O.A. proceedings were terminated for jurisdictional reasons and a subsequent Part III Information was laid alleging the same offences.

Regina v. Levine (July 23, 1985), unreported (Ont. S.C.)

Arguments Against The Application Of The Doctrine To Provincial Offences

1. **Connelly v. D.P.P.** was decided on other grounds, namely the impossibility of determining issues decided for or against an accused who was previously acquitted of a murder charge.
2. The jurisdiction is confined to higher courts with inherent jurisdiction.
3. The doctrine is an infringement of the Crown's absolute power to prosecute which was upheld in **Regina v. Smythe** (1971), 3 C.C.C. (2d) 97, confirmed (1971), 3 C.C.C. (2d) 366

(S.C.C.)

4. The theory of laches is an equitable remedy and has no place in criminal or quasi-criminal proceedings.
5. Other than the **Abitibi** case, most authorities designate provincial offences as quasi-criminal and therefore civil procedures are not appropriate.
6. The power to stay proceedings is traditionally and by statute given to the Attorney General or his agents and absent any clear authority a Justice of the Peace or Provincial Judge has no inherent powers such as those possessed by a superior court.
Doyle v. The Queen (1976), 29 C.C.C. (2d) 177 (S.C.C.)
Osborn v. The Queen (1971), 1 C.C.C. (2d) 482 (S.C.C.)
7. Unfair or oppressive is not sufficiently definitive to allow for the termination of proceedings brought by the state. It is open to many individual Judges' and Justices' interpretations.
8. An accused has as well as the specific defences, all the appeal procedures and prerogative remedies to ensure fairness and proper procedures. However, the Crown's right of appeal or review is severely curtailed within narrow limitations. Further the rights of appeal are simplified and expeditious under the **Provincial Offences Act**.

ACCOMPLICES

Introduction

The common law has traditionally viewed the trustworthiness of accomplice testimony with suspicion. It was felt that an accomplice would attempt to escape punishment himself by blaming the others or he would perjure himself in return for a promise of immunity.

Although the rules about accomplice evidence and corroboration thereof have been abrogated (see **CORROBORATION OF ACCOMPLICE EVIDENCE** *infra*), it is likely that any court will place less weight on the evidence of an accomplice standing alone.

Defined

An accomplice is anyone who has criminally (not innocently) co-operated with, assisted or even encouraged another to commit a crime. He is a partner in the crime or one who could also have been charged with the offence.

MacDonald v. The Queen (1946), 87 C.C.C. 257 (S.C.C.)

Corroboration Of Accomplice Evidence

In the past it was necessary for the trial Judge to warn the jury or if sitting alone to at least implicitly instruct himself as to the rule that it was dangerous to base a conviction on the evidence of an accomplice unless that evidence was corroborated in a material particular which implicated the accused. The jury or Judge may have convicted on the accomplice evidence alone but it was dangerous to do so. This led to further determinations and descriptions of who might be an accomplice, who in fact was an accomplice, what evidentiary items might be corroborative and what items in fact were corroborative.

However, in 1982, the unduly and unnecessarily complex law of corroboration was swept away. Now there is no special category for “accomplices”. An accomplice is to be treated like any other witness testifying at a criminal trial and the Judge’s conduct, if he chooses to give his opinion is governed by the general rules as to witnesses.

Vetrovec v. The Queen (1982), 67 C.C.C. (2d) 1 (S.C.C.)

Crown Calling An Accomplice

When an accomplice is tried separately or is unindicted, he is a compellable and competent witness for the Crown. To remove the incentive for the accomplice to seek favour with the prosecution or to minimize his role by shifting the blame to the others, have the proceedings against the accomplice completed including his sentence.

Rex v. Canning (1937), 68 C.C.C. 321 at 322, 323 (S.C.C.)

Further it is suggested that evidence which confirms the testimony of the accomplice ought to be presented to allow the court to better assess the credibility of the accomplice.

Who Is An Accomplice

Although the categorization of a witness is less significant since **Regina v. Vetrovek**, (1982), (S.C.C.), it might be helpful to assess the status of a witness who is testifying against another

accused. Therefore it has been held that accomplices include:

1. Accessories after the fact
2. Purchaser of alcohol from bootlegger
3. Receiver of stolen goods from thief

Who Is Not An Accomplice

The following have been found to be excluded from the accomplice category:

1. Informers and agents provocateur
2. A purchaser of marijuana from a trafficker
3. Victim of illegal abortionist
4. Children
5. A party to an offence who testifies on behalf of an accused
6. An innocent spouse of an accused

ADVERSE WITNESS

Introduction

Occasionally a witness when testifying in chief will give evidence contrary to the testimony which the examiner expects. In some cases, the wisest course of action is simply to cease the questioning before more damage is done. However, in other cases it may be desirable to proceed under Section 23 of the **Evidence Act**, R.S.O. 1980, and confront the witness with a previous inconsistent statement.

Adverse Defined

This means assuming a position opposite to that of the party calling him. An adverse witness is one who bears a hostile animus to the party calling him so not to give his evidence fairly and with a desire to tell the truth. One who is opposed in interest or unfavourable in the sense of opposite in position.

Wawanesa Mutual Insurance v. Hanes, [1961] O.R. 495 (Ont. C.A.) and [1963] S.C.R. 154 (S.C.C.)

An openly hostile and antagonistic witness will be suspect from the beginning but it is more difficult to expose a person who conceals his averseness and bias beneath a false exterior of fairness and goodwill. The purpose of having a witness declared adverse is to show that his sworn testimony should not be given due weight. The previous inconsistent statement, if put to the adverse witness, cannot serve as evidence against the accused except insofar as the witness adopts it as part of his testimony, and serves only to test the credibility of the witness.

Rex v. Duckworth (1916), 26 C.C.C. 314 (Ont. C.A.)

Deacon v. The King (1947), 89 C.C.C. 1 (S.C.C.)

Section 23 of the Ontario Evidence Act

This procedure requires a finding that the witness is “adverse” and allows the party calling the witness to cross examine on an inconsistent statement if the witness gave one earlier.

If the witness recants his sworn evidence and accepts his earlier statement as true, it becomes admissible as evidence.

If the witness does not agree that he made an earlier statement, then extrinsic evidence should be called to prove this.

If the witness does not agree with the contents of the earlier statement, it then can be used to cast doubt upon the credibility of his evidence at the trial.

Procedure For Cross-Examining An Adverse Witness

1. Decide the advantages or otherwise of having the witness declared adverse. This would be based on the relative importance of the testimony, the degree and number of inconsisten-

cies with prior statements and the general demeanour of the witness.

2. Obtain leave of the Judge and then give the witness the statement to refresh his memory.
Stewart v. The Queen (1976), 31 C.C.C. (2d) 497 (S.C.C.)
3. Advise the court that an application under Section 23 of the **Ontario Evidence Act** is being made.
4. Commence a voir dire during which counsel should note specific contradictions between his evidence and the prior statement.
5. Ask the witness if he recalls being at a certain place at a certain date and making a statement. If the witness answers affirmatively and recognizes the statement as his own, the statement should be filed as an exhibit on the voir dire. If the witness denies making the statement, it must be proved independently — usually through police officers who recorded it.
6. Opposing counsel should have an opportunity to cross-examine the witness on the voir dire although it may be of no advantage to their case and they may refrain.
7. The trial Judge after considering the statement and any inconsistencies between it and the evidence given in court should determine the adversity of the witness. The court should, in arriving at a determination of adversity consider such factors as:
 - (a) the hostility of mind towards the party calling him.
 - (b) the opposing interest or position to the party calling him.
 - (c) the manner of giving evidence.
 - (d) demeanour.
 - (e) the previous statement. If this is sufficiently contradictory to his evidence in court, it may alone be sufficient proof of adverseness.
 - (f) any other relevant circumstances.

The trial Judge must rule on the issue of adversity before counsel can proceed with a cross-examination of the witness. The court decides if the witness is adverse — not counsel.

Regina v. McIntyre (1963), 43 C.R. 262 (N.S.C.A.)

Adverse As Opposed To Hostile

It is submitted that there is no longer a definitive distinction between an adverse and a hostile witness.

However, the Ontario Evidence Act appears to limit the cross-examination of an adverse witness to inconsistencies disclosed in the statement and the witness cannot be cross-examined on other matters, i.e., no cross-examination at large. This is contrasted with cross-examination at large allowed under section 9(1) of the **Canada Evidence Act**.

See *Regina v. Milgaard* (1971), 2 C.C.C. (2d) 206 (Sask C.A.)

Oral Statement Or In Writing

An inconsistent statement may be one that was made orally or in writing.

Regina v. Cassibo (1983), 70 C.C.C. (2d) 498 (Ont. C.A.)

For example a statement given orally to a police officer who recorded it may be used to cross-examine an inconsistent witness.

Regina v. Carpenter (1982), 31 C.R. (3d) 261 (Ont. C.A.)

Burden Of Proof That Statement Was Made By Witness

The party producing the statement must only adduce prima facie proof that the witness previously made a statement (not proof on balance of probabilities or beyond a reasonable doubt).

Regina v. Boyce and Meade (May 31, 1974), unreported (Ont. Co. Ct.)

Examples Of Adverse Or Inconsistent Witnesses

F: Witness, a friend of accused, could not recollect several facts such as being involved in a robbery or testifying at a previous trial. He still could not remember after reading 15 to 20 pages of his previous testimony. Crown applied to have him declared adverse under s.9(1) of the **Canada Evidence Act** and inconsistent under s.9(2) of the **Canada Evidence Act**.

H: Crown can cross-examine at large because witness is “adverse” meaning opposed in interest or unfavourable to side calling him and his declared forgetfulness of matters he should remember indicates this.

Regina v. Gushue (No. 4) (1975), 30 C.R.N.S. 178 (Ont. Co. Ct.)

F: Witness on a voir dire could not recall certain portions of her detailed statement given at the time. These portions related to admissions by the accused to her that he had killed the deceased.

H: Was open to trial Judge to conclude that the witness was lying as to her recollection and therefore giving inconsistent evidence. Witness therefore could be cross-examined as to the contents of the statement by the party calling her.

McInroy v. The Queen (1979), 42 C.C.C. (2d) 481 (S.C.C.)

ALIBI

Introduction

This defence is essentially nothing more than a plea of not guilty wherein the accused leads evidence that he was not the perpetrator because he was somewhere else when the offence was committed. It is not a special plea but is raised under a general not guilty plea when the identity of the perpetrator is in issue.

Demers v. The King (1926), 46 C.C.C. 395 (Que. K.B.)

Degree Of Proof

An accused need not prove his alibi beyond a reasonable doubt nor even to the satisfaction of the court. If the alibi, even though not accepted, raises a reasonable doubt as to his guilt, the accused must be acquitted.

Rex v. Talbot (1944), 83 C.C.C. 41 (Ont. C.A.)

Alibi And Other Defences

A defendant may put forward an alibi defence along with other defences e.g., *Regina v. Mahoney* (1979), 50 C.C.C. (2d) 380 (Ont. C.A.) although for obvious reasons alibi is usually advanced as the single defence.

Consideration Of The Alibi As A Defence

Alibi as with most other defences need not be considered separately before approaching the rest of the case. That is, triers of fact should not firstly determine the alibi evidence in a vacuum apart from all the other evidence.

Steinberg v. The King (1931), 56 C.C.C. 9 (S.C.C.)

However, the evidence given in support of the alibi should be delineated for a jury to weigh in determining the degree of proof applicable to it.

Lizotte v. The King (1950), 99 C.C.C. 113 (S.C.C.)

Early Disclosure

The principle is established that the defence of alibi should be disclosed to the prosecution at the earliest possible moment in order that it may be inquired into. Failure to make early disclosure is a material circumstance to be taken into account when determining its reliability.

Rex v. Littleboy (1934), 24 Cr. App. R. 192 (Eng. Ct. of Cr.App.)

Russell v. The King (1936), 67 C.C.C. 28 (S.C.C.)

Rex v. Grigoreshenko and Stupka (1945), 85 C.C.C. 129 (Sask. C.A.)

Rex v. Garrett (1949), 95 C.C.C. 160 (B.C. Co. Ct.)

The first available opportunity is that time when the accused is first made aware of the offence e.g., when arrested, not when he later appears in court.

Regina v. Laverty (1977), 35 C.C.C. (2d) 151 (Ont. C.A.)

Order Of Alibi Evidence

When the defence is alibi, the accused should be the first defence witness.

Regina v. Archer (1974), 26 C.R.N.S. 225 (Ont. C.A.)

Accused To Testify As To Alibi

The failure of an accused who is advancing the defence of alibi to testify under oath is a matter of importance in considering the validity of the defence.

Vezeau v. The Queen (1976), 28 C.C.C. (2d) 81 (S.C.C.)

An accused who does not testify himself as to his alibi cannot expect an appellate court to consider such a defence.

Catellier v. The King (1948), 93 C.C.C. 394 (Que. Ct. of K.B., Appeal Side)

Regina v. Hutton (1953), 105 C.C.C. 189 (B.C.S.C.)

Regina v. Howarth (1971), 1 C.C.C. (2d) 546 (Ont. C.A.)

Reply To Alibi

The prosecution can call reply evidence to rebut the alibi evidence even though the reply evidence also confirms the prosecution's original case.

Rex v. Therien and Sanseverino (1943), 80 C.C.C. 87 (B.C.C.A.)

Even though the prosecution has notice of an alibi defence, it can call rebuttal evidence after the defence actually tenders the alibi evidence. It is only upon the calling of this alibi evidence that the rebuttal evidence becomes legally relevant.

Regina v. Rafferty (1984), 6 C.C.C. (3d) 72 (Alta. C.A.)

Previous Inconsistent Statement Of Alibi Witness Admissible

A defence witness — wife of accused — made a statement after the first trial to the effect that the co-accused who was acquitted had committed the offence along with her husband. On the retrial, this statement was admitted to cross-examine the wife.

Regina v. Belanger (October 18, 1976), unreported (Ont. C.A.)

Contradictory Alibi Statements

The giving of contradictory statements by an accused with respect to his whereabouts at the critical time may constitute evidence that one or more of the statements were fabricated.

Regina v. Andrade (1985), 13 W.C.B. 289 (Ont. C.A.)

Inferences From An Alibi Which Is Not Accepted

There is a difference in the effects of an alibi which is simply not believed and an alibi which is found to be fabricated and false. If there is evidence led by the Crown which conflicts with the accused's alibi, the court may accept the Crown evidence, reject the alibi and conclude that the accused lied about it to escape the consequences of the crime.

Regina v. Jones (1971), 3 C.C.C. (2d) 153 at 160 (Ont. C.A.)

If the court simply disbelieves the accused's alibi, then no inference of a consciousness of guilt can be drawn by the court. The court in effect just considers all the other evidence of guilt without specifically considering the alibi evidence.

Regina v. Davison et al. (1974), 6 O.R. (2d) 103 (Ont. C.A.)

Regina v. Mahoney (1979), 50 C.C.C. (2d) 380 (Ont. C.A.) affirmed by S.C.C. (1982), 7 W.C.B. 475

Regina v. Laverty (1977), 35 C.C.C. (2d) 151 (Ont. C.A.)

If the court concludes that the alibi is false, then it may infer a consciousness of guilt from

the accused's concoction of the alibi, i.e., the fabrication of an alibi is a circumstance from which guilt may be inferred.

Regina v. Davison et al. (1974), 6 O.R. (2d) 103 (Ont. C.A.)

Regina v. Mahoney (1979), 50 C.C.C. (2d) 380 (Ont. C.A.) affirmed by S.C.C. (1982), 7 W.C.B. 475

What The Prosecution Can Do About Alibi Defence

Before Trial

1. Anticipate this defence if the identity of the perpetrator is the sole contested issue.
2. When the particulars of the alibi are made known, investigate all the evidence as to the whereabouts of the accused and the alibi witnesses at the material time. Also inquire into the background of each alibi witness, his relationship to the accused, any inconsistent statements that the witness made and all other circumstances of the offence which may be helpful in cross-examination e.g., the weather at the time of the offence. If the accused is in custody, obtain a list of his visitors.

At Trial

1. Cross-examine each alibi witness to determine some or all of the following matters:
 - (a) When the witness first learned the accused was charged.
 - (b) When the witness first learned the offence date and from whom.
 - (c) When the witness first realized that he could testify as to the alibi.
 - (d) What he did as a result of learning that he could exculpate the accused.
 - (e) When he contacted the police to advise them of his knowledge of the whereabouts of the accused.
 - (f) Did he testify at the preliminary hearing.
 - (g) Did he give a statement orally or in writing to anyone.
 - (h) Did he visit the accused in or out of custody.
 - (i) What is his relationship to the accused, e.g., friend, relative, debtor, business associate et cetera.
 - (j) Did he discuss his evidence with the accused or with other alibi witnesses.
2. Test each witness carefully on his ability to recall events on dates other than the offence date.
3. Possibly reserve tendering the accused's statement until rebuttal, if tendered at all.

Regina v. Adams et al. (1956), 25 C.R. 80 (N.S.S.C. in banco)
Regina v. Black and Mackie, [1966] 3 C.C.C. 187 (Ont. C.A.)
Regina v. Drake (1971), 1 C.C.C. (2d) 396 (Sask. Q.B.)
Regina v. Ament (1972), 7 C.C.C. (2d) 83 (Ont. H.C.)
Regina v. Ryckman (1972), 19 C.R.N.S. 14 (Ont. S.C.)
Regina v. Lizotte (1980), 18 C.R. (3d) 364 (Que. C.A.)

BURDEN OF PROOF

Introduction

In every prosecution the Crown must prove at least two elements, namely that the offence was committed and that the defendant committed it. If the offence requires such an element, the prosecution must also prove that the defendant possessed the necessary mental state. Usually the latter is proved circumstantially or inferentially. Identity also can be proved by circumstantial evidence in addition to direct evidence.

The **Provincial Offences Act** does not delineate the burden of proof upon the prosecution, therefore the onus is that for pure criminal offences, namely beyond a reasonable doubt.

Regina v. Beauchamp (1953), 16 C.R. 270 (Ont. C.A.)

See REASONABLE DOUBT *infra*

Evidential Burden

At times a defendant may be required to lead evidence which rebuts a presumption or else risk having the trier of fact find adversely against him. These legal presumptions, also referred to as burdens of persuasion, may be impressed upon a defendant by statute or at common law. They require the introduction of evidence by the party upon whom they rest.

See EXCEPTIONS, EXEMPTIONS *infra*

Ultimate Burden

After all the evidence has been adduced and the burdens of persuasion shifting onuses, presumptions, and evidential burdens have been considered, the trier of fact must deal with the legal burden on the prosecution which is proof beyond a reasonable doubt.

CIRCUMSTANTIAL EVIDENCE

Introduction

Direct evidence is that which is proved either by its actual production or by the testimony of someone who has personally perceived it. With direct evidence the court must only be satisfied with the authenticity of the object or the credibility of the witness.

Circumstantial evidence means that from facts proved by direct evidence, the court is asked to infer certain other facts. Unlike direct evidence, the court has to consider also the correct inference to be drawn from the proven facts.

Generally, the value and weight of circumstantial evidence increases with the number of facts established and as the possible inferences to be drawn are progressively decreased.

Also, an analogy has been made to a jigsaw puzzle in that no one piece is sufficient in itself but when all the pieces are put together there is a completed picture.

Rex v. Prince (1945), 85 C.C.C. 97 (B.C.C.A.)

Regina v. Junior (judgment filed December 16, 1974), unreported (Sask. C.A.)

Finally, circumstantial evidence can be compared to the strands of a rope. In contrast with a chain, which is only as strong as its weakest link, a circumstantial fact or strand can break and the strength of the rope is barely diminished due to the other strands which are more than strong enough to support a verdict.

Rule In Hodge's Case

In criminal or quasi-criminal proceedings, circumstantial evidence must be considered in light of the rule in **Hodge's Case** which is that "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."

[1838] 2 Lewin 227, 168 E.R. 1136

The rule in **Hodge's Case** is not to be used in relation to the issue of the mental state, i.e., the intent of the offender or the mental element of the crime. It relates only to the identification of the offender as the person who committed the offence and does not apply to circumstantial evidence led by the Crown to prove the intent of the offender.

Regina v. Mitchell, [1965] 1 C.C.C. 155 (S.C.C.)

Regina v. Cooper (1977), 34 C.C.C. (2d) 18 (S.C.C.)

Not To Negative Every Possible Inference

The Crown does not have the burden of negating every conjecture to which circumstantial evidence might give rise and which might be consistent with the innocence of the accused in establishing proof beyond a reasonable doubt.

Regina v. Paul (1976), 27 C.C.C. (2d) 1 (S.C.C.)

See REASONABLE DOUBT

Abolition Of The Rule

Since 1977, the test for all evidence is simply, "has the Crown proven its case beyond a reasonable doubt?"

“The time has come to reject the formula in **Hodge’s Case** as an inexorable rule of law in Canada. Without being dogmatic against any use of the formula of the charge in **Hodge’s Case** I would leave the matter to the good sense of the trial Judge . . . with the reminder that a charge in terms of the traditional formula of required proof beyond a reasonable doubt is the safest as well as the simplest way to bring a lay jury to the appreciation of the burden of proof resting on the Crown in a criminal case.”

“It is enough if it is made plain to the members of the jury that before basing a verdict of guilty on circumstantial evidence they must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts.”

Regina v. Cooper (1977), 34 C.C.C. (2d) 18 at 22 and at 33 (S.C.C.)

Regina v. Monteleone (April 28, 1982), unreported (Ont. C.A.)

Timing Of Rule

If the rule in **Hodge’s Case** is now applicable at all, it is so at only the end of the matter, not at the point of a nonsuit motion without an election by accused whether or not to call evidence.

Regina v. Mackey (1971), 4 C.C.C. (2d) 192 (Ont. C.A.)

Regina v. Paul (1976), 27 C.C.C. (2d) 1 (S.C.C.)

Regina v. Lavoie et al. (1978), 39 C.C.C. (2d) 480 (S.C.C.)

Application Of Rule To Total Case

It is not necessary that each item of circumstantial evidence be subjected to the test in **Hodge’s case**. It is sufficient if all the facts put in evidence when considered together satisfy the rule.

Regina v. John (1971), 2 C.C.C. (2d) 157 (S.C.C.)

CROSS-EXAMINATION

Introduction

The purposes of cross-examination are to elicit additional information favourable to the cross-examining party and to weaken, qualify, render highly unlikely or totally negate the evidence testified to by the other side. This is usually accomplished by impugning the credibility of the opponent's witnesses.

Provincial Offences Act

See Sections 47(2) and 47(3) for the statutory mandate for this right.

Suggestions For Cross-Examination

1. A cross-examiner's aims can be accomplished by obtaining contradictory statements from the witness, by eliciting from the witness facts tending to counteract the effect created by the facts testified to by him, by eliciting facts which subvert the conclusions at which the opposite party is aiming and by showing that the facts deposed by the witness are not the result of his own perception.
2. Manner plays a great role in advocacy. A different answer may be elicited by a different tone by the examiner and emphasis upon certain words may produce different versions of the same story.
3. Avoid strengthening your opponent's case by asking questions that were omitted in his examination-in-chief.
4. A witness may be led on to expose a manifest bias. A strong interest weakens the side on which it lies.
5. Unless the explanation is necessary for your case, do not cross-examine for explanations.
6. Whenever you have once fairly caught a witness, do not sacrifice the advantage by exhibiting him too ostentatiously. Similarly, do not put the same question upon some important piece of evidence to every witness. If one contradicts another, let the matter rest because a third witness may make a guess and corroborate the first which only weakens the effect of the contradiction.
7. Remember your opponent can re-examine on matters arising out of your cross-examination; therefore, avoid asking a question which may trigger a flood of questions for your opponent.

Ordinary Rules Of Evidence Apply

So far as cross-examination to the issue is concerned, the ordinary rules with regard to the admissibility of evidence apply so that the prosecution cannot cross-examine the accused on the contents of an inadmissible confession and the rule against hearsay applies.

Cross on Evidence (3rd ed.) p. 211.

Hearsay evidence, unless an evidentiary exception exists, is as inadmissible in cross-examination as it is in examination-in-chief.

Phillion v. The Queen (1977), 37 C.R.N.S. 361 (S.C.C.)

Judicial Interference

A trial Judge should allow full cross-examination as long as it is material to an issue or touches the credibility of a witness. The court may exclude irrelevant, insulting or repetitious cross-examination.

Rex v. Anderson (1938), 70 C.C.C. 275 (Man. C.A.)

Cormier v. The Queen (1974), 25 C.R.N.S. 94 (Que. C.A.)

Trial Judge may disallow cross-examination which invites hearsay responses or which harasses the witnesses but may not place a time limit in which it must be completed.

Regina v. Bradbury (1973), 23 C.R.N.S. 293 (Ont. C.A.)

A trial Judge should not engage in conversations with a witness that are not understood by an accused's counsel. He should not act as an interpreter for any witness.

Turkiewicz et al. v. Regina (1979), 10 C.R. (3d) 352 (Ont. C.A.)

A trial Judge who constantly interrupts counsel or who makes denigrating comments about an accused or his counsel does not allow for the necessary appearance of a fair trial.

Turkiewicz et al. supra.

Who Can Cross-Examine

Any accused against whom a witness has testified may cross-examine the witness.

Regina v. Cooper, [1970] 2 O.R. 54 (Ont. C.A.)

An accused has an absolute right to cross-examine a co-accused who testifies at their joint trial irrespective of whether the evidence is favourable or unfavourable to him.

Regina v. McLaughlin (1974), 15 C.C.C. (2d) 562 (Ont. C.A.)

Sequence Of Cross-Examinations

Defence counsel should cross-examine witnesses, including co-accuseds who testify, in the order of the names on the Indictment unless otherwise agreed upon by the defence or directed by the trial Judge who may consider the respective degrees of criminality and the seniority of counsel.

Rex v. Barsalou (No. 3) (1901), 4 C.C.C. 446 (Que. K.B.)

Salhany, Canadian Criminal Procedure 3rd edition at p. 211.

Counsel for accused must cross-examine before Crown counsel.

Rex v. Barsalou (No. 3) supra

Regina v. Jewell (1974), 28 C.R.N.S. 331 (Ont. C.A.)

Cross-Examination On A Previous Written Statement

A witness may be cross-examined as to a previous written statement he made but if it is intended to contradict him on certain parts, those parts of the writing that are to be so used must be drawn to his attention.

Ontario Evidence Act, R.S.O. (1980), Section 20 and Canada Evidence Act, Section 10.

Cross-Examination On A Previous Sworn Statement

If a witness has given evidence at a previous trial or judicial hearing and this testimony differs from what he says in his examination-in-chief, he can be cross-examined to point out the inconsistencies.

Cross-Examination On A Previous Oral Statement

Section 21 of the **Ontario Evidence Act** and Section 11 of the **Canada Evidence Act** provide for proof of contradictory oral statements.

Cross-Examination By The Party Calling The Witness

A party may, upon discovering inconsistencies in the witness' story, cross-examine its own witness with permission of the trial Judge. Such cross-examination must be confined to a specific matter such as the contents of a previously signed statement.

Regina v. Cooper, [1970] 2 O.R. 54 (Ont. C.A.)

However, in order to cross-examine the witness at large, the party calling the witness must have the witness declared hostile or adverse.

Regina v. Cooper, [1970] 2 O.R. 54 (Ont. C.A.)

See ADVERSE WITNESS

Cross-Examination As To Previous Convictions

Any witness may be asked upon cross-examination whether he has been convicted of a criminal offence and if he denies or refuses to answer, the cross-examiner must attempt to prove the convictions.

Ontario Evidence Act, Section 22

Regina v. Titchner (1961), 131 C.C.C. 64 (Ont. C.A.)

This cross-examination goes to the credibility of the witness and not directly to a determination of guilt or innocence (and the trial Judge must charge the jury to that effect).

Regina v. Martin (1960), 129 C.C.C. 356 (B.C.S.C.)

Rex v. Fushtor (1946), 85 C.C.C. 283 (Sask. C.A.)

Regina v. Williams and Irvine, [1969] 1 O.R. 139 (Ont. C.A.)

Regina v. Skippen, [1970] 1 C.C.C. 230 (Ont. C.A.)

As to how this cross-examination affects credibility, it is submitted that the fact of conviction itself, as well as the witness recognition of rejection of it, affects the weight to be given to his evidence.

"The accused Goldhar gave evidence on his own behalf and, of course, denied the conspiracy charged against him. Goldhar had a previous criminal record and in his charge to the jury, the learned trial Judge made some reference to it, but the reference he made to it related to the question of the credibility that the jury might attach to Goldhar's evidence, and this is what the learned trial Judge said: "Then we have the question of weighing his evidence. We know that Goldhar has a substantial criminal record, and it has been hinted Craig, too, has been involved. Now, as I think one or more counsel told you those facts are not put forward for you gentlemen to jump to the conclusion that because they are 'bad eggs', you must find them guilty. We do not try people in this country on their records. But Goldhar's record is disclosed to you because he goes into the witness-box, swears on oath to tell the truth and gives evidence on his own behalf; and you have to determine whether he is the sort of person whom you can believe under these circumstances, and whether the sanctity of an oath is likely to weigh with him or not.

Objection was taken to what the learned trial Judge there said, and, in our unanimous opinion, the objection fails."

Regina v. Goldhar (1957), 117 C.C.C. 404 at 406 (Ont. C.A.)

"Cross-examination as to prior convictions is not directly aimed at establishing the falsity

of the witness' evidence; it is rather designed to lay down a factual basis — prior convictions — from which the inference may subsequently be drawn that the witness' credibility is suspect and that his evidence ought not to be believed because of his misconduct in circumstances totally unrelated to those of the case in which he is giving evidence. The evidentiary value of such cross-examination is therefore purely inferential.”

Morris v. The Queen (1979), 43 C.C.C. (2d) 129 at 152 per Pratte J. for the majority (S.C.C.)

“The first of those grounds of appeal is that the trial judge misdirected the jury with respect to the use that could be made of the prior criminal record of the witness Charbonneau. The learned trial judge charged the jury as follows:

Now, I would like to deal just for a brief moment ladies and gentlemen of the jury, with the matter of the evidence that came out about previous convictions, and you will recall that I interjected at the time that this first came out and told you that it was to be considered only by yourself with respect to the credibility of the witness, or in the one case the accused, and in the other the witness, Charbonneau. That's all that it's for, you know, because a person committed a crime at some time doesn't mean that he's going to lie. The two do not necessarily follow and I want to make that very plain to you, that you are to consider it only for that purpose, as to whether he is telling the truth about his record, and the records were admitted by both.

Mr. Girones, for the appellant, said that this error was compounded by what the trial judge said when Charbonneau's record was introduced, where the trial judge made the following comment:

COURT: One moment, Mr. Sloan, Members of the jury, I just want to point out to you that the matter of the record of this man's record only goes as to what's called “credibility”. In other words, is he a truthful man by virtue of the fact that he is admitting to have a record and it's a matter of determining whether he answers the question truthfully, about the record. The fact that a man has a record doesn't necessarily mean that he is going to commit further crime, as I am sure you can appreciate. For this purpose, you are only to guide yourself and use that in determining whether he is a truthful man or not that's all.

The court had previously intervened when defence counsel asked Charbonneau whether he considered that he was an entirely trustworthy individual. The court said: “Mr. Sloan, there is no issue as to the man's character.” Mr. Girones, for the appellant, contended that the jury as a result of the judge's charge may have been left with the impression that Charbonneau's credibility remained unimpaired because he had truthfully acknowledged his criminal record. The trial judge's view of the limited use that prior convictions have on the issue of credibility was not correct. The theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or convictions, is a relevant fact in assessing the testimonial trustworthiness of the witness: see **R. v. Stratton** (1978), 42 C.C.C. (2d) 449 at p. 461, 90 D.L.R. (3d) 420, 3 C.R. (3d) 289 at p. 303. The purpose of cross-examination of a witness with respect to prior convictions is to permit an inference that his moral disposition is such that his oath is not to be relied upon.”

Regina v. Gonzague (1983), 4 C.C.C. (3d) 505 at 509, 510 (Ont. C.A.)

No Discretion To Disallow Questions As To Convictions

A court does not have discretion to prevent counsel from cross-examining the accused/defendant as to prior convictions for criminal offences.

Regina v. Leforte (1962), 31 D.L.R. (2d) 1 (S.C.C.)

Regina v. Stratton (1979), 42 C.C.C. (2d) 449 (Ont. C.A.)

Procedure For Cross-Examination As To Convictions

A witness should be asked the name of the crime, the time and place of the conviction, and the punishment awarded. Details of the crime are not permitted.

Regina v. Boyce (1976), 23 C.C.C. (2d) 16 at 35-37 (Ont. C.A.)

Apparently, in other provinces, the general question, “were you convicted of any offences?” is permitted.

Regina v. Clark (1978), 41 C.C.C. (2d) 561 (B.C.C.A.)

Conviction Under Appeal

Any witness may be cross-examined as to a conviction which is under appeal at that time.

Hewson v. The Queen (1979), 42 C.C.C. (2d) 507 (S.C.C.)

Juvenile Record

An accused/defendant or any other witness may be cross-examined as to his juvenile record of **Criminal Code** offences even if the delinquencies were adjourned sine die.

Morris v. The Queen (1979), 43 C.C.C. (2d) 129 (S.C.C.)

Questions which show the character or antecedents of a witness when he was a juvenile are permitted.

Regina v. Bradbury (1973), 23 C.R.N.S. 293 (Ont. C.A.)

Foreign Convictions

A witness including an accused/defendant may be cross-examined as to convictions in foreign countries if the foreign offence would be an offence in Canada.

Regina v. Stratton (1979), 42 C.C.C. (2d) 449 (Ont. C.A.)

Previous Convictions Not To Include Provincial Offences

Section 22 of the **Ontario Evidence Act** refers to federal criminal offences and does not allow cross-examination as to offences under provincial statutes.

Street v. City of Guelph, [1965] 2 C.C.C. 215 (Ont. H.C.)

Does Not Include Discharges

A defendant may not be cross-examined on offences which he was found guilty and then granted a discharge.

Regina v. Tan (1975), 22 C.C.C. (2d) 184 (B.C.C.A.)

Regina v. Danson (1982), 66 C.C.C. (2d) 369 (Ont. C.A.)

Does Not Include Discreditable Conduct

A defendant, unlike an ordinary witness, cannot be cross-examined on discreditable acts

unless he puts his character in issue or the discreditable acts resulted in convictions. However, if the cross-examination is directed to proving the falsity of his evidence or if the defendant puts his character in issue it may be carried out even though it incidentally shows discreditable conduct by the defendant.

Regina v. Davison et al. (1974), 20 C.C.C. (2d) 424 (Ont. C.A.)

Regina v. Danson (1982), 66 C.C.C. (2d) 369 (Ont. C.A.)

Cross-Examination On Withdrawn Charges

A trial Judge must not permit cross-examination of an accused with respect to charges which had been laid but later withdrawn.

Regina v. Skippen, [1970] 1 O.R. 689 (Ont. C.A.)

Of Crown Witness As To Pending Charges

A Crown witness who is testifying against an accused may be cross-examined as to charges pending against him for purposes of showing his motive for favouring the Crown.

Titus v. The Queen (1983), 2 C.C.C. (3d) 321 (S.C.C.)

Collateral Questions

The general rule, based on the desirability of avoiding a multiplicity of issues, is that the answers given by a witness to questions put to him in cross-examination concerning collateral facts such as his credibility must be treated as final — the cross-examiner must take them for better or worse and cannot contradict them by other evidence. Whether or not a matter is collateral is determined by relevancy and the test is whether evidence could be led in direct examination on that matter as relevant to the issues in dispute.

Cross on Evidence (3rd ed.) p. 216, 217.

The basis for the rule is that while a witness' answers to certain questions such as his associations or mode of life may be relevant to only his credibility, the court will not allow itself to be sidetracked by hearing contradictory evidence on this collateral issue. Therefore, the answer must be taken for better or for worse and it cannot be contradicted by other evidence.

“It has long been settled that when an irrelevant question of this nature is put to a witness of the opposite party and is answered, the party putting the question is bound by the answer and cannot be allowed to produce witnesses to prove that the answer is false”.

Rex v. Muma (1910), 17 C.C.C. 285 (Ont. C.A.) at 289-290.

There is a qualification for Ontario practitioners that if any evidence is introduced in chief, it may be cross-examined on and evidence to contradict it may be called.

See *Regina v. Gross* below

Another exception to the rule with respect to the cross-examination on collateral matters is that a witness may be cross-examined about facts which suggest that he is biased, impartial or prejudiced and if he denies these facts, other witnesses may be called to contradict him.

McRae on Evidence, 2nd, ed. at p. 369.

Some Examples of Collateral Questions are:

F: On a charge of fraud in connection with the operation of a travel agency by deceitfully representing to customers that he would secure landed immigrant status for them, the accused was cross-examined by Crown as to filing of income tax returns to which he replied

that he had filed for most years. The Crown called evidence to prove that accused had not filed returns for past ten years.

- H: The Crown was bound by this answer to a collateral question relating only to credibility and was not entitled to call evidence to contradict it.

Regina v. Rafael (1972), 7 C.C.C. (2d) 325 (Ont. C.A.)

- F: On a prosecution for rape, complainant was asked whether she had lived common-law with a person other than accused. She denied so living and defence allowed to call witnesses to state she had lived common-law.

- H: Question was irrelevant to issue and complainant's evidence was final and cannot be contradicted.

Rex v. Muma (1910), 17 C.C.C. 285 (Ont. C.A.)

- F: On a charge of murder, a Crown witness was cross-examined as to his manufacturing evidence in another trial. Witnesses were called by the defence to state he was mentally abnormal and a potential perjurer.

- H: Evidence was collateral and cannot be contradicted by subsequent witnesses.

Steinberg v. The King (1931), 56 C.C.C. 9 (S.C.C.)

- F: Accused charged with attempted abortion denied in chief using syringe on other women. Crown called witnesses in reply that contradicted accused.

- H: Even though evidence in chief was irrelevant, once admitted, it cannot be contradicted as goes to a collateral issue only.

Rex v. Hrechuk (1950), 98 C.C.C. 44 (Man.C.A.)

N.B. This case is not valid any longer in view of *Regina v. Gross*, below.

- F: Accused, on a charge of making counterfeit money, testified in chief to his supposedly reputable business dealings for the purpose of establishing that he was a substantial business man not likely to have engaged in the offences charged. Reply evidence called by Crown to show that accused's businesses were not substantial and business phones given by accused did not exist.

- H: Reply evidence was admissible (though collateral) because it was in relation to matters brought out in examination-in-chief and rule prohibiting evidence to contradict collateral matters has no application, i.e., reply evidence may be called in respect of any matter that is introduced in examination-in-chief.

Regina v. Gross (1973), 9 C.C.C. (2d) 122 (Ont. C.A.)

- F: Witness cross-examined as to whether he had been in trouble with the police and specifically whether he had been in a fight with a police officer.

- H: Such cross-examination is irrelevant and not permitted.

Regina v. Skippen, [1970] 1 C.C.C. 230 (Ont. C.A.)

Another occasion when rebuttal evidence may be called by the Crown is when defence calls evidence which goes primarily to unreliability of Crown witness(es).

- F: Defence evidence was directed solely at establishing that main Crown witness was not truthful. Crown called rebuttal evidence which established that defence witnesses themselves were not truthful.

- H: Rebuttal evidence was admissible because although was not strictly relevant to main issue

of guilt or innocence, in view of the thrust of the defence, the credibility of Crown witness was clearly a major fact in issue and far from being only collateral.

Regina v. Shewfelt (1972), 6 C.C.C. (2d) 304 (B.C.C.A.)

Right To See Items Referred To In Notebook

When a witness refers to specific notes while testifying, opposing counsel is entitled to see the notes and conduct his cross-examination in the light of what the note discloses. However, only the note referred to is examinable.

Regina v. Vallillee (1954), 107 C.C.C. 405 (Ont. C.A.)

Witness To Be Cross-Examined If Intent Is To Contradict

Any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must be put to that witness to allow him to explain the apparent contradictions. Failure to do so may imply acceptance of the evidence-in-chief and may prevent the cross-examiner from calling contrary evidence. At the very least, the lack of cross-examination should allow reply evidence to clear up the unsatisfactory state of the evidence.

“Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity to make an explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.”

Browne v. Dunn (1893), 6 R. 67 per Lord Herschel

“To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.”

Browne v. Dunn, supra per Lord Halsbury at 76-77.

“If there could be any doubt as to the meaning of the witness, it was the duty of counsel acting for the accused to clear up the situation by cross-examination. The House of Lords in *Browne v. Dunn* (1893), 6 R. 67, laid down the rule that there is a duty to cross-examine, drawing the attention of the witness to any particular point upon which it is intended to suggest that he is not speaking the truth, so that he may have an opportunity of making any explanation open to him, unless it is perfectly clear from the surrounding circumstances that it is intended to impeach his story. A fortiori, I think, it is the duty of counsel to cross-examine where it is intended to suggest that a

witness is perverting the truth by the use of a word which is capable of an ambiguous meaning, in such a way as to mislead in the administration of justice.”

Rex v. Foxton (1920), 34 C.C.C. 9 at 10, 11. (Ont. S.C.)

See also: Cross on Evidence (5th ed.) p. 257

Phipson on Evidence (9th ed.) p. 497

McRae on Evidence (2nd ed.) p. 370

Rex v. Moke (1917), 28 C.C.C. 296 (Alta. C.A.)

Rex v. Nepp (1927), 48 C.C.C. 275 (Man. C.A.)

Rex v. Mandzuk (1945), 85 C.C.C. 158 (B.C.C.A.)

Rex ex rel. Taylor v. Vanmeer (1950), 97 C.C.C. 241 (Ont. Co. Ct.)

Regina v. Miller (1959), 125 C.C.C. 8 (B.C.C.A.)

United Cigar Stores Ltd. v. Buller and Hughes (1931), 66 O.L.R. 593 (Ont. C.A.)

Perras v. Perras (1909), 42 S.C.R. 244 (S.C.C.)

Walter Berkley Hart, [1932] Cr.App.R. 202 (Eng. Ct. of Crim. App.)

Regina v. Dyck, [1970] 2 C.C.C. (2d) 283 (B.C.C.A.)

Regina v. Jackson and Woods (1975), 20 C.C.C. (2d) 113 (Ont. H.C.)

Palmer and Palmer v. The Queen (1980), 50 C.C.C. (2d) 193 (S.C.C.)

Witness Not To Comment on Veracity Of Other Witness(es)

A witness during cross-examination should not be asked his opinion on the veracity of other witnesses. Such questions are unfair and irrelevant.

Rex v. Markadonis (1935), 63 C.C.C. 122 at 126 per Mellish, J. affirmed entirely by Supreme Court of Canada at (1935), 64 C.C.C. 41 per Sir Lyman Duff at 41.

“Q. You are saying that these things that are in the statement you didn’t say to Crawford at that time?

A. No, no, not at that time.

Q. If you were to say — if he were to say otherwise then he would be lying?”

This last question is improper.

Regina v. Ruptash (1982), 68 C.C.C. (2d) 182 (Alta. C.A.) relying on

Rex v. Markadonis, *supra*.

DOCUMENTARY EVIDENCE

Introduction

Historically, courts have been very careful to admit only documents whose reliability was certain. Three rules sprang out of this concern:

- (1) The Parol Evidence Rule which disallowed any extrinsic evidence which would vary, or contradict the terms of a written agreement.
- (2) The requirement that someone authenticate i.e., identify, the document.
- (3) The Best Evidence Rule which required that the original document must be produced if it is available.

Over many years the courts and the legislatures have recognized that technological and other changes have removed some of the reasons for the above rules. Exceptions to the rules have become so numerous that it seems as if only the Best Evidence Rule remains extant.

Provincial Offences Act

See sections 3(7), 43(2), 48(2), 58(4), 91(b), 139, 141

Exceptions To The Best Evidence Rule

In some situations recourse may be had to evidence which is not strictly the original. At common-law secondary evidence of a document is permitted when:

1. The nature of the object is such that it would be impossible or impracticable to bring it into the courtroom.
2. The original document is lost or destroyed or in the hands of a third party who cannot be compelled to produce it.
3. It is a public document which cannot be produced without great inconvenience to the public.

Cross on Evidence (3rd ed.) 501, (5th ed.) pp. 600-601

Phipson on Evidence (10th ed.) pp. 1705-1711

By statute many exceptions allow for the admissibility of copies or proof by secondary (oral) evidence of a document. Some examples are:

1. Copies of statutes, ordinances, and other public documents printed under the authority of a government body;
Ontario Evidence Act, R.S.O. 1980 Chapter 145, section 25
2. Copies of proclamations, orders regulations or appointments.
Ontario Evidence Act, R.S.O. 1980 Chapter 147, section 26
Orders signed by Secretary of State or Provincial Secretary;
Ontario Evidence Act, sections 27, 28.
3. Copies of official or public documents.
Ontario Evidence Act, sections 29 and 54.
4. Copies of entries in government books of account.
Ontario Evidence Act, section 31.
5. Copies of public books or documents.
Ontario Evidence Act, section 32.
6. Copies of bank entries.
Ontario Evidence Act, section 33.
7. Photographs of records.
Ontario Evidence Act, section 34.
8. Business records.
Ontario Evidence Act, section 35.
9. Copies of notarial acts.
Ontario Evidence Act, section 39.
10. Oaths, affirmations etc.
Ontario Evidence Act, sections 44, 45.
11. Medical reports.
Ontario Evidence Act, section 52.
12. Copies of instruments certified by registrar or master of titles.
Ontario Evidence Act, section 53.
13. Copies of documents filed with the Ministry of Transportation and Communications.
Highway Traffic Act, section 184(3).

Computer Records

A computer print-out is admissible as a copy of an entry in any book or record kept in a financial institution within the meaning of section 29 of **Canada Evidence Act**.

Regina v. McMullen (1979), 42 C.C.C. (2d) 67 (Ont. H.C.) affirmed (1978-79), 3 W.C.B. 313 (Ont. C.A.)

Computer printouts of bookkeeping system admissible as business records.

Regina v. Vanlerberghe (1979), 6 C.R. (3d) 222 (B.C.C.A.)

Photocopies

A photocopy of a document is admissible without proof that the copies were compared

with the original. Photocopies are reliable, produced without human intervention and are used unquestionably in everyday experience.

Regina v. Lutz (1978), 22 O.R. (2d) 300 (Ont. Prov. Ct.)

Accountant's Summary Of All Exhibits

A summary of the transactions and records prepared by an accountant from the voluminous documents entered on the trial is admissible to assist the court in understanding and digesting the materials and allowing the trier of fact to decide the case without undue concern with necessary but extremely tedious documentation. The summary must be presented by an expert and based on documentation introduced into or to be introduced into evidence.

The expert must be available for cross-examination.

Regina v. Simmonds et al., [1967] 2 All E.R. 399 (C.A.)

Hoyer v. U.S. 223 F. (2d) 134 (U.S.C.A.-8th Cir.)

McDaniel v. U.S. 343 F. (2d) 785 (U.S.C.A.-5th Cir.)

Regina v. Parks (January 28, 1974), unreported (Ont. Co. Ct.)

Regina v. Scheel (1979), 42 C.C.C. (2d) 31 (Ont. C.A.)

DUPLICITY

Introduction

At common law a rule developed against charging two offences within a single count. This position is continued in section 26(1) of the **Provincial Offences Act**.

The stated rationale for the rule was to ensure that a defendant knew precisely the charge he was facing and to allow him to plead *autrefois* convict or *autrefois* acquit later if charged with another offence arising out of the same incident. This historical reason was examined in 1978 by the Supreme Court of Canada and a new analysis proffered.

See CURRENT TEST.

Summary conviction cases prior to 1955 should be read with a view to the strict provisions against duplicity which then existed. Since the **Criminal Code** amendments of 1955, the tests and procedures have been substantially altered.

Regina v. Cotroni; *Papalia v. The Queen* (1979), 45 C.C.C. (2d) 1 at 14 (S.C.C.)

Provincial Offences Act

See sections 26(1), 26(8), 34(1) and 37(2).

Past Tests For Duplicity

In the past various counts have received judicial scrutiny when it was suggested that they were duplicitous. A series of criteria were put forward against which to measure the count.

1. Can the accused, on a charge of doing A or B, do A without doing B or vice versa?
Archer v. The Queen, [1955] S.C.R. 33 (S.C.C.)
2. Are the events closely related in time, place or circumstances so that several of them can be regarded as a single transaction?
Regina v. Rafael (1972), 7 C.C.C. (2d) 325 (Ont. C.A.)
Regina and Jarman et al. (1972), 6 C.C.C. (2d) 235 (Ont. H.C.)
Regina v. Hulan, [1970] 1 C.C.C. 36 (Ont. C.A.)
Regina v. Zamal et al., [1964] 1 C.C.C. 12 (Ont. C.A.)
Regina v. Canavan and Busby, [1970] 5 C.C.C. 15 (Ont. C.A.) affirmed [1970] 5 C.C.C. 22n. (S.C.C.)
3. Are the separate descriptions merely alternative modes of committing the offence? What is the gist of the offence?
Regina v. Ball et al., [1966] 4 C.C.C. 178 (Ont. C.A.)
Regina v. Brunet, [1969] 1 C.C.C. 297 (S.C.C.)
Regina v. Hickey et al., [1965] 2 C.C.C. 170 (N.S.S.C.)
Regina v. Schultz (1962), 133 C.C.C. 174 (Alta. C.A.)
4. Are the acts of the accused a continuous offence? This should take into account the actual period of time over which the acts extended, the lapse of time between each act, the places where the acts occurred and the nature of the acts themselves inasmuch as some are more likely to be of a continuous nature.
Regina v. Flynn (1955), 111 C.C.C. 129 (Ont. C.A.)

Current Test

The foregoing somewhat confusing tests and approaches were considered by the Supreme

Court of Canada. Mr. Justice Dickson who delivered the opinion of a unanimous court on a charge that the City of Sault Ste. Marie did discharge, or cause to be discharged, or permitted to be discharged, or deposited materials into Cannon Creek and Root River, or on the shore or bank thereof, or in such place along the side that might impair the quality of the water in Cannon Creek and Root River, between March 13, 1972 and September 11, 1972. The charge was laid under s.32(1) of the **Ontario Water Resources Act**, R.S.O. 1970, c. 332, [formerly **Ontario Water Resources Commission Act**, renamed by 1972, c. 1, s.70(1)] which provides, so far as relevant, that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof, or in any place that may impair the quality of water, is guilty of an offence and, on summary conviction, is liable on first conviction to a fine of not more than \$5,000 and on each subsequent conviction to a fine of not more than \$10,000, or to imprisonment for a term of not more than one year, or to both fine and imprisonment. He stated, "In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge? Viewed in that light, as well as by the other tests mentioned above, I think we must conclude that the charge in the present case was not duplicitous. There is nothing ambiguous or uncertain in the charge. The city knew the case it had to meet. Section 32(1) of the **Ontario Water Resources Act** is concerned with only one matter, pollution. That is the gist of the charge and the evil against which the offence is aimed. One cognate act is the subject of the prohibition. Only one generic offence was charged, the essence of which was "polluting", and that offence could be committed in one or more of several modes. There is nothing wrong in specifying alternative methods of committing an offence, or in embellishing the periphery, provided only one offence is to be found at the focal point of the charge. Furthermore, although not determinative, it is not irrelevant that the information has been laid in the precise words of the section."

Regina v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 at 361.

Effects Of A Finding of Duplicity

When a single count is found to contain more than one offence, it may be rendered voidable which implies that it stands until it is attacked and may be remedied by striking out the excess words which contain the extra count. The defect, if there is one, is a defect of form — a defect apparent on its face and therefore amendable.

"In **Edwards v. Jones**, [1947] 1 K.B. 659, it was held by a Divisional Court in England that the provision in the Summary Jurisdiction Act, 1848, that no objection is to be taken or allowed to any information for any alleged defect therein in substance or in form, does not mean that Justices can proceed to hear an information which charges two offences contrary to s.10 of that Act. In his reasons for judgment Lord Goddard C.J. stated at p. 662: "If magistrates find an information preferred which contains two offences and not one, they should take steps to see that it is amended. The way they should do it — the authorities bear this out — is by saying to the prosecutor: 'On which offence do you elect to proceed?' The prosecutor can then say: 'I will elect to proceed upon offence A.' Thereupon the information should be amended by striking out the second offence charged, so that the defendant is only called upon to answer to the one offence. On the other hand, if the prosecutor says: 'I decline to elect,' then the information is bad. No conviction could take place upon it, because any such conviction would be bad for duplicity. Therefore magistrates in those circumstances should say: 'If you will not elect we dismiss the information because it is bad.'"

There is no reason why the same procedure could not be followed in the Courts of Ontario.

I am unhesitatingly of the opinion that the information should not have been quashed by the learned Magistrate and that he had power to amend it and should have done so in accordance with the request made by counsel for the Crown.”

Regina v. Peacock (1954), 108 C.C.C. 129 at 132, 133 per Schroeder, J. (Ont. H.C.)

See also *Regina v. Edgar and Rea* (1962), 132 C.C.C. 396 (B.C.C.A.)

See also *Regina v. Cotroni, Papalia v. The Queen* (1979), 45 C.C.C. (2d) 1 (S.C.C.)

See also *Regina v. Baldassara* (1973), 11 C.C.C. (2d) 17 (Ont. H.C.J.)

See also *Regina v. Cipolla*, [1966] 1 C.C.C. 179 (Ont. C.A.) affirmed [1966] 1 C.C.C. 205 (S.C.C.)

Also, the trial judge may divide a duplicitous count and proceed on the divided counts. The **Kienapple** principle would preclude multiple convictions.

See PLEAS.

Provincial Offences Act Section 34(1)

Regina v. Bass and Bass, [1970] 3 C.C.C. 422 (Ont. C.A.)

Regina v. Cotroni; Papalia v. The Queen (1979), 45 C.C.C. (2d) 1 at 12 (S.C.C.)

The amendment of a duplicitous summary conviction ticket beyond the limitation date does not render it invalid because the amended count is simply a continuation of the original charge.

Rex v. Ross (1949), 94 C.C.C. 150 (Ont. C.A.)

Regina v. Peacock (1954), 108 C.C.C. 129 (Ont. H.C.)

Regina v. Standeven (1973), 10 C.C.C. (2d) 433 (Ont. H.C.)

Examples Of Counts Found Not To Be Duplicitous

See the following:

1. **Cox and Paton v. The Queen**, [1963] S.C.R. 500 (S.C.C.)
2. **Gatto and Tonellatto v. The King** (1938), 70 C.C.C. 249 (S.C.C.)
3. **Regina v. Ball et al.**, [1966] 4 C.C.C. 178 (Ont. C.A.)
4. **Fraser Book Bin Ltd. v. The Queen**, [1967] S.C.R. 38 (S.C.C.)
5. **Regina v. Leach**, [1956] O.W.N. 61 (Ont. C.A.)
6. **Rex v. Cheng Tong Seng** (1927), 49 C.C.C. 79 (B.C.C.A.)
7. **The King v. Michaud** (1909), 17 C.C.C. 86 (N.B.S.C.)
8. **Regina v. Matspeck Construction**, [1965] 2 O.R. 730 (Ont. H.C.J.)
9. **Regina v. Brunet**, [1968] S.C.R. 713 (S.C.C.)
10. **Regina v. McCallum** (1974), 21 C.C.C. (2d) 308 (Man. C.A.)
11. **Regina v. Cipolla**, [1966] 1 C.C.C. 179 affirmed [1966] 1 C.C.C. 205 (S.C.C.)
12. **Regina v. Morse Jewellers (Sudbury) Ltd.**, [1963] 3 C.C.C. 304 (Ont. H.C.)
13. **Regina v. Hickey et al.**, [1965] 2 C.C.C. 170 (N.S.S.C.)

EXAMINATION-IN-CHIEF

Introduction

A witness is first examined-in-chief by the party who calls him. This step is sometimes referred to as direct examination. Relevancy determines that the witness testify only to facts in issue and facts which are relevant to an issue.

The object of examination-in-chief is to obtain testimony in support of the version of the facts in issue, or relevant to the issue for which the party calling the witness contends.

Cross on Evidence (5th ed.) at p. 226

Provincial Offences Act

See Section 47, subsection 3.

Leading Questions

Generally a party cannot be asked leading questions when examined-in-chief. Some of the reasons given for this prohibition are the danger that a witness who is nervous will simply assent to a question or give the easiest answer and accordingly give evidence which he did not intend to give or which he does not believe. Further leading questions are objectionable because of the possibility of prearrangement between the examiner and the witness as well as the impropriety of suggesting the existence of facts which are not in evidence.

A leading question is one which either suggests the desired answer or assumes the existence of a disputed fact. A question which requires a yes or no answer is not leading unless it falls into one of these categories.

Exceptions To The Rule Against Leading Questions

The rule that a witness cannot be asked leading questions admits of many exceptions based on necessity, convenience or established practice.

1. A witness who has been declared adverse may be asked leading questions.
Canada Evidence Act s.9(1).
See ADVERSE WITNESSES.
2. A witness may always be led on the formal introductory parts of his testimony. It is the duty of counsel to dispose of preliminary matters as efficiently as possible and bring the witness to the facts in issue. “. . . the general rule is that in examining one’s own witness, not that no leading questions may be asked, but that on material points one must not lead his own witness but on points that are merely introductory and form no part of the substance of the inquiry one should lead.”
Maves v. Grand Trunk Pac. Rlwy. Co. (1913), 14 D.L.R. 70 (Alta. S.C.) at 74-75;
3. The Judge may ask leading questions.
Connor v. Township of Brant (1914), 6 O.W.N. 206 (Ont. C.A.)
4. As it would often be impossible to persuade a witness to identify a person or thing in court without the aid of leading questions, it is permissible to direct the attention of the witness

directly to them. For example, “Was that the man you saw?” “Was that the book he loaned to you?”

Cross on Evidence (5th ed.) p. 227

Maves v. Grand Trunk, *supra*

5. When the inability of the witness to answer a question obviously is caused by a defective memory. For example, the witness leaves out an important part of his testimony. After repeated efforts to have him recall it, the questioner should be permitted to ask a question which contains a reference to the subject matter of the statement that has been omitted.

Maves v. Grand Trunk, *supra*

Regina v. Coffin (1956), 23 C.R. 1 at 19, 20 (S.C.C.)

6. Where the matter as to which the witness is being interrogated is extremely complicated, such as medical evidence, it may be necessary to permit direct queries to clarify certain points.
7. When it is necessary to obtain an express denial of some allegation, it may be necessary to ask certain direct questions which may indirectly suggest the answer that counsel wants. For example:

Q: “It has been suggested by the previous witness that on the day in question you admitted to him that you had been drinking since early that morning — did you make that statement?”

A: “I certainly did not.”

8. When the witness is handicapped, leading questions are permitted. They may be employed to assist a witness whose ability to testify is hindered due to extreme youth or age, lack of education, mental or physical disability or any other testimonial limitation.

Wigmore on Evidence Vol. 3., ss.769-779

Ratushny, “Basic Problems in Examination and Cross-examination” (1979), 52 Can. B. Rev. 209 at 212.

Suggestions For Examination-In-Chief

1. Always know what a witness will say and how that testimony relates to the main features of your case.
2. After having covered the preliminary or introductory matters, it is advisable to let witnesses tell their story in their own words, with a minimum of questioning, confined to the material points of the case. Usually the events should be told in the order in which they occurred, with the accompanying conversations if material, relevant and admissible. Evidence given by a witness in his own words is more credible than a series of short responses to the questioner.
3. With the exception of preliminary matters, a witness should not be asked leading questions unless necessary. Evidence adduced by leading questions with the witness merely assenting to it is not usually given much credence. On the other hand, it is equally dangerous when the witness comes out with a long story that has the appearance of having been memorized.
4. When a witness gives a surprising or disappointing answer, drop the question and proceed to more familiar ground without showing your dissatisfaction. Return later to the same

question, differently worded, and if he persists in an innocent mistake you may attempt to refresh his recollection after laying the proper foundation.

5. A skillful examiner will leave his witness in such a position as to be able to withstand cross-examination by having the witness reveal every fact and motive completely and all its important bearings upon the attendant circumstances.
6. Witnesses, unaccustomed to courts, are often so confused that they cannot distinguish between the friendly and the adverse counsel. It is your function to set the witness right by friendly tones, words, and a kindly smile. These may draw the witness towards relating his narrative which, when he entered the witness box, had escaped his memory in his terror. A series of simple preliminary questions will assist in putting the witness at ease in the unfamiliar courtroom surroundings:
Q: "Where do you live?"
Q: "How long have you lived there?"
Q: "How old are you?"
Q: "What is your occupation?"
Q: "Where do you work?"
Q: "How long have you been employed there?"
Q: "On January 2nd of this year you were driving your automobile south on Main Street when you noticed a vehicle approaching from the rear — is that correct?"
7. Questions in examination-in-chief should be carefully framed and deliberately put to bring out so much as you desire, and no more. The court will not be impatient with a pause when it discovers that you have in fact abbreviated the case by a pause which enables you to keep the evidence strictly to the point at issue.
8. An honest story told by one credible witness will serve the purpose of two or three half-hearted witnesses. You must judge for yourself as to which witness will likely fare best in the witness box.
9. If the witness goes off on tangents, you must gradually bring him back. Above all, never be rude to him even if his story is going against you.
10. Deal with each subject matter completely before moving to a different topic. All material details of a topic should be exhausted before going on to the next point. The order in a motor vehicle case might be:
 1. How the witness came to be on the scene.
 2. On what street was he proceeding and in what direction.
 3. Was he alone at the time.
 4. What did he notice concerning the traffic prior to the accident.
 5. What did he see and hear at the moment of impact.
 6. What did he see and hear after the accident.
11. All questions should be relevant to the issues because to go beyond this will only open up areas which are then ripe for cross-examination. For example, if a witness is asked in chief

whether or not he has been convicted of any driving offences, his driving record is an issue which can be cross-examined on with possible devastating effects. It is better to ascertain in advance all specific convictions and put these to him in chief if this is considered necessary.

Accused Must Be Given An Opportunity To Testify In Chief:

F: Defendant was not given an opportunity to testify on his own behalf before being cross-examined.

H: The conviction could not stand. The court lost jurisdiction over the defendant who was entitled to make full answer and defence. The procedure here was a breach of natural justice.

Michaels v. The Queen (1969), 8 C.R.N.S. 63 (Ont. S.C.)

Defendant's Absolute Right To Call A Witness

A defendant/accused has an absolute right to call any witness for the defence, including a witness previously called by the Crown and cross-examined by the defence. The trial Judge has no discretion in this matter so long as the evidence is relevant.

Regina v. Cook (1960), 127 C.C.C. 287 (Alta. C.A.)

EXCEPTIONS, EXEMPTIONS, AUTHORIZATIONS OR QUALIFICATIONS

Introduction

The ultimate burden of proof beyond a reasonable doubt rests on the prosecution from the beginning until the verdict. However, an evidential burden may shift to a defendant in certain circumstances throughout a trial. This burden placed on an accused requires him to show, on a balance of probabilities, that there was a lawful excuse for his actions.

Regina v. Appleby (1971), 3 C.C.C. (2d) 354 (S.C.C.)

The burden may exist at common law in which case it is based upon an evidential doctrine that facts which are peculiarly, although not solely, within the knowledge of a defendant, should be established by that defendant.

“The rules of law relating to the burden of proof are of great importance and, in general, a prosecutor must prove every fact necessary to substantiate a charge against a prisoner. The burden of proof may be shifted by legislative interference, and certain exceptions to the general rule have been recognized by the common law. One of those exceptions is that “where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour”: *Taylor on Evidence*, 12th ed., vol. 1, s.376. “This exception equally prevails in all civil or criminal proceedings instituted against parties for doing acts which they are not permitted to do unless duly qualified”: *ibid.*, s.377.

In *Archbold’s Criminal Pleading, Evidence & Practice*, 31st ed., p. 330, the present rule upon the subject of negative averments is stated as follows: “In cases where the subject of such averment relates to the prisoner personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the prisoner, as matter of defence; on the other hand, if the subject of the averment does not relate personally to the prisoner, or is not peculiarly within his knowledge, but either relates personally to the prosecutor, or is peculiarly within his knowledge or at least in as much within his knowledge as within the knowledge of the prisoner, the prosecutor must prove the negative.”

Rex v. Roher (1947), 89 C.C.C. 365 at 374, 375 (Ont. C.A.)

Usually, the enactment must be construed as a prohibition against the doing of some acts subject to provisos and exemptions before the prosecution can rely on this principle.

Further, the presumptions which can be characterized as evidentiary onuses do not appear to be affected by the **Charter**, however ultimate onuses which require an accused to negative an essential element of the offence or which are not rationally connected to the proved facts may conflict with the **Charter** provisions.

See **CHARTER IMPLICATIONS** *infra*.

Provincial Offences Act

See sections 26(9) and 48(3)

Onus On Defendant

It is not enough for a defendant to raise a reasonable doubt in rebutting an evidentiary

onus. The burden is met by the defendant satisfying the civil onus of proof by a preponderance of evidence or by a balance of probabilities.

Regina v. Appleby (1971), 3 C.C.C. (2d) 354 (S.C.C.)

Tupper v. The Queen, [1968] 4 C.C.C. 253 (S.C.C.)

Regina v. Proudlock (1979), 5 C.R. (3d) 21 (S.C.C.)

Ease Of Defendant Satisfying Onus

The fact which the accused is required to prove must be one that he can reasonably be expected to prove as it is within his knowledge. A fact which he could not reasonably be expected to know cannot be the subject of a valid reverse onus or exception, exemption et cetera.

Regina v. Shelley (1981), 59 C.C.C. (2d) 292 (S.C.C.)

Examples of Statutory Exceptions

1. "Every person who without having a licence under this Act, . . . has in his possession . . . any such still is guilty of an indictable offence. . . ."
Rex v. Rysack (1922), 38 C.C.C. 45 (Ont. S.C.)
2. "A person who is found to be occupying the seat ordinarily occupied by the driver of a motor vehicle is deemed to have care or control of that vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion."
Regina v. Appleby (1971), 3 C.C.C. (2d) 354 (S.C.C.)
3. "Except as provided by this Act, the **Liquor Licence Act** or the regulations hereunder or thereunder, no person shall by himself, his clerk, servant or agent, expose, or keep for sale, or directly or indirectly or upon any pretence, or upon any device, sell or offer to sell, liquor or, in consideration of the purchase or transfer of any property, or for any other consideration or at the time of the transfer of any property, give liquor to any another person."
Regina v. Park Hotel (Sudbury) Ltd., [1966] 4 C.C.C. 158 (Ont. District Ct.) leave to appeal to S.C.C. refused 1967 (S.C.R.)
4. When an offence is one of strict liability, the onus is upon the defendant to prove a defence of due diligence.
Regina v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 (S.C.C.)
5. "Being the owner of a motor vehicle, unlawfully did permit the said vehicle on a highway . . . when the said vehicle was not insured under a contract of automobile insurance contrary to section 2(1)(a) of the **Compulsory Automobile Insurance Act**." Section 2(1)(a) of the **Compulsory Automobile Insurance Act** states — subject to the regulations, no owner of a motor vehicle shall operate the motor vehicle on a highway unless the motor vehicle is insured under a contract of automobile insurance.
Regina v. Edward Bibeau and Raymond Stone (January 16, 1984), unreported (Ont. Co. Ct.)
6. "In not being the owner or agent of the owner of a mining claim then being worked and not being thereunder authorized in writing by the proper officer in that behalf named in any Act relating to mines in force in the Province of Ontario, he did, within the said provisions, sell ore, mineral and gold contrary to the provisions of the said section."
Rex v. Fresco (1933), 59 C.C.C. 391 (Ont. C.A.)
7. "Unlawfully supplying contact lenses to a person while not being a member of the Alberta

Guild of Ophthalmic Dispensers and not being the holder of a certificate of competency in dispensing contact lenses and not supplying in accordance with a complete prescription of and subject to the directions of and under the supervision of an ophthalmologist or optometrist, contrary to. . . .”

Regina v. Hundt (1971), 3 C.C.C. (2d) 279 (Alta. C.A.)

8. “Unlawfully did without lawful excuse, have in their possession instruments suitable for house-breaking under circumstances that gave rise to a reasonable inference that the said instruments were intended to be used for house-breaking. . . .”
Regina v. Holmes (1983), 4 C.C.C. (3d) 440 (Ont. C.A.)
9. The doctrine of recent possession whereby a person found in possession of recently stolen goods is presumed to know that they were stolen.
Regina v. Russell (1983), 4 C.C.C. (3d) 460 (N.S.C.A.)
10. A provision whereby the owner (as opposed to the driver) of a vehicle may be charged with a motor vehicle offence.
Regina v. Watch (1983), 10 C.C.C. (3d) 521 (B.C.S.C.)
Regina v. Arbon (1983), 10 C.C.C. (3d) 11 (Ont. Div. Ct.)
11. A refusal to provide a sample of breath allowing an inference adverse to the accused to be drawn.
Regina v. Van Den Elzen (1983), 10 C.C.C. (3d) 532 (B.C.C.A.)
12. A charge of operating a business without a licence from a provincial authority.
Regina v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.)

“Evidence To The Contrary”

Some presumptions of guilt require an accused to raise evidence to the contrary to prevent an inference of guilt or the establishing of a *prima facie* case. In order for this evidence to be of any effect it must be believed by the court. Any evidence to the contrary given by an accused which is disbelieved will not displace the evidentiary onus upon him if one exists.

Regina v. Proudlock (1979), 5 C.R. (3d) 21 (S.C.C.)

Charter Implications

A statutory reverse onus required a possessor of narcotics to establish that his possession was not for purposes of trafficking. If the possessor did not meet this onus, guilt followed automatically. Since the proved facts — possession were not rationally connected to the presumed facts — for purposes of trafficking, the reverse onus is invalid.

Regina v. Oakes (1983), 2 C.C.C. (3d) 339 (Ont. C.A.); *aff'd.* (1986) 24 C.C.C. (3d) 321, 50 C.R. (3d) 1 (S.C.C.)

The reverse onus embodied in section 48(3) of the **Provincial Offences Act** is constitutionally valid as not conflicting with sections 11(c) nor 11(d) of the **Charter**.

Regina v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.)

A bylaw prohibited parking unless the owner had a permit affixed to the vehicle. This reverse onus in s.730(2) of the **Code** does not infringe section 11(d) of the **Charter**.

Regina v. Rogers (1984), unreported (Ont. S.C.)

HEARSAY

Introduction

The best rationale for this exclusionary rule is that it is not capable of being tested by cross-examination. Also the demeanour of the third party cannot be observed.

It is not the form of the statement that gives it its hearsay or non-hearsay characteristic but rather it is the use to which it is sought to be put; i.e., if the relevance of the statement lies in the fact that it was made, it is the making of the statement that is the evidence — the truth or falsity of the statement itself is of no consequence and this is not hearsay. If the relevance of the statement lies in the fact that it contains an assertion which is itself a relevant fact, then it is the truth or falsity of the statement that is in issue and this is hearsay. The same statement may be original or hearsay evidence according to the purpose for which it is offered as evidence; e.g., if A goes to B's home and in reply to an enquiry B's servant states that B is away from home, the statement of B's servant is hearsay if offered to prove B's absence — it is original evidence if offered to prove A's belief that B was absent.

Regina v. Willis, [1960] 1 W.L.R. 55 (Ct. of Crim. App. Eng.)

Regina v. Abbey (1982), 68 C.C.C. (2d) 394 at 407-409 (S.C.C.)

Acts Or Gestures

Acts or gestures of third persons are included in hearsay.

F: On a murder charge, the deceased had been asked who stabbed her and she indicated the accused. She was then asked if it was the accused and she nodded in the affirmative.

H: The nod of the head constituted a verbal statement and was hearsay. (Was admissible here because of specific Ceylanese statute).

Chandaraskera v. The King (1931), 30 Cox C.C. 546 (P.C.); [1937] A.C. 220

Elicited On Cross-Examination

Hearsay evidence cannot be elicited through cross-examination, particularly where the cross-examination is being done on behalf of the accused.

F: Accused was charged with indecent assault on a young girl. The mother of the girl was giving evidence and counsel for the accused attempted to elicit from the mother that the girl had said shortly after the assault that the assault had been made on her by a coloured boy. The accused was not coloured. The girl did not testify.

H: This evidence of the statement of the girl through the mother was hearsay and inadmissible.

Sparks v. The Queen, [1964] A.C. 964 (P.C.); [1961] 1 All E.R. 727

Once evidence has been defined as hearsay, the rule is simple. The evidence is inadmissible unless it falls within one of the specific exceptions.

Defined

“ . . . oral or written assertions of persons other than the witness who is testifying are inadmissible as evidence of the truth of that which was asserted.”

Cross on Evidence (3rd ed.) p. 4

“express or implied assertions of persons other than the witness who is testifying and assertions

in documents produced to the court when no witness is testifying are inadmissible as evidence of the truth of that which was asserted.”

Cross on Evidence (3rd ed.) p. 387

“oral or written statements made by persons who are not parties and who are not called as witnesses are inadmissible to prove the truth of the matters stated.”

Phipson on Evidence (11th ed.) Ch. 15, p. 269

“Former oral or written statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them.”

Phipson on Evidence (11th ed.) Ch. 15, p. 268

“A statement is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.”

Subramaniam v. Public Prosecutor, [1956] 1 W.L.R. 965 at 970 (P.C.)

What Is Not Hearsay

“It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.”

Subramaniam v. Public Prosecutor [1956] 1 W.L.R. 965 at 970 (P.C.)

Applied in *R. v. Abbey* (1982), 68 C.C.C. (2d) 394 at 408 (S.C.C.)

In **Subramaniam** the evidence under consideration was oral statements made to the accused by others. The purpose was not to establish the truth of what those others had said but rather to establish the fact that it had been said, and the effect that this had on the accused’s state of mind.

H: This evidence was admissible and not hearsay because of the purpose for which it was tendered.

Subramaniam, *supra*

“The mere fact that evidence of a witness includes evidence as to words spoken by another person, who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when words spoken are relied on “testimonial”, that is, as establishing some fact narrated by the words . . . the test of admissibility in this case is relevance to an issue.”

Ratten v. The Queen (1972), 56 Crim. App. R. 18 (Privy Council)

Common Law Exceptions

These share two characteristics — there are circumstances inherent in this evidence which indicates reliability and they are the best evidence available in the circumstances. If testimony comes under an exception, it is original evidence.

1. **Declarations as to Declarant’s Physical and Mental Condition:** Statements made by a person as to a contemporaneous physical sensation or condition, or as to his state of mind or emotion are admissible as evidence of that sensation, emotion or condition. The weight

of authority is that the declarant must be deceased for the declaration to be admissible. Generally the statements are evidence only of the existence of a condition and are not evidence of the cause of the injury but that inference may be drawn by the court.

F: The circumstances surrounding the death of the deceased were such that the murderer was either the victim's husband or the accused. Statements by the deceased asking for her husband and describing her condition were admitted by trial judge.

H: Statements properly admitted as statements indicating a mental condition, i.e., that deceased wanted her husband and jury could decide what inferences might be drawn from them.

Rex v. Wysochan (1930), 54 C.C.C. 172 (Sask.C.A.)

F: Shortly after lifting heavy timber Y stated to his partner S that he thought he had hurt himself and died the next day.

H: Statement of Y admitted (through S) and jury could infer that the lifting of the timber caused the injury for which Y's estate was suing.

Youlden v. London Guarantee Co. (1912), 26 O.L.R. 75, affirmed (1913), 28 O.L.R. 161 (Ont.C.A.)

The statement as to physical sensation by deceased may be admitted although made some time after the event causing the statement to be made.

Youlden v. London Guarantee Co. (ibid)

Evidence of statements of intention, e.g., declarant states to X that he intends to do something has been admitted in civil cases but is severely limited in criminal cases.

F: Evidence of statement made by deceased to a friend that she intended to go to the accused's home was inadmissible on a charge of murder.

Rex v. Wainwright (1875), 13 Cox C.C. 171

If however, the case required proof of intent (*mens rea*), e.g., on a charge of murder, a statement by the accused, "I'm going to kill you", would be relevant and admissible.

2. Dying Declarations: This evidence is admitted because the death of the declarant removes the only witness to the deed and unless admitted the wrongdoer might go free. Also it is unlikely that the declarant, at point of death will perjure his soul by dying with a lie on his lips. The dying declaration may be oral or written or even by signs.

R. v. Smith, [1865] L. and C. 607

Regina v. Woods (1897), 2 C.C.C. 159 (B.C.C.A.)

Rex v. Magyar (1906), 12 C.C.C. 114 (N.W.T.S.C.)

It may also be made in response to leading questions.

R. v. Chandrasekera, [1937] A.C. 220 (P.C.)

Both questions put to declarant and his answers should be given in evidence so that the court can determine whether or not the statements were made spontaneously and what was suggested by the question.

R. v. Mitchell (1892), 17 Cox C.C. 503

The declaration must be confined to circumstances which led to the accused's death but includes all facts immediately connected therewith.

Rex v. Laurin (1902), 5 C.C.C. 324 at 326 (Que.Ct.K.B.)

Therefore on a charge of manslaughter arising out of an alleged illegal operation, evidence

of a dying declaration that the accused attempted to procure an abortion on her weeks before is inadmissible.

Rex v. Buck (1940), 74 C.C.C. 314 (Ont.C.A.)

The trial Judge rules as to whether the declaration is admissible while the weight of it is for the jury.

Rex v. Christenson (1923), 39 C.C.C. 203 (Alta.C.A.)

Rex v. McIntosh (1937), 69 C.C.C. 106 (B.C.C.A.)

Are several requirements for statement by deceased as to his cause of death to be admitted.

- (a) Admitted on the trial for murder or manslaughter of the declarant. However, a dying declaration was admitted on charge of criminal negligence causing death.

Regina v. Jurtyn (1958), 121 C.C.C. 403, 28 C.R. 295 (Ont. C.A.)

- (b) Declarant is dead as a result of accused's act, within a reasonable time after statement made.

Rex v. McIntosh (1937), 69 C.C.C. 106 (B.C.C.A.)

Rex v. Bernadotti (1869), 11 Cox C.C. 316

Not merely have been afraid of death or felt he was about to die.

Regina v. Jurtyn (1958), 121 C.C.C. 403, 28 C.R. 295 and annotation ante (Ont. C.A.)

- (c) The declarant must have had a settled hopeless expectation of impending death when he made the statement. Evidence that declarant subsequently hoped for recovery or did recover later doesn't render statement inadmissible.

Regina v. Davidson (1898), 1 C.C.C. 351 (N.S.S.C.)

R. v. Austin (1912), 8 Cr. App. R. 27 (Ct. of Crim.App.Eng.)

R. v. McMahon (1889), 18 O.R. 502 (Ont.H.C.J.)

However, it is not necessary to prove that declarant believed death would ensue immediately.

King v. Perry, [1909] 2 K.B. 697 (Eng. Ct. of Crim. App.)

Evidence to establish that declarant believed that death was approaching may be such as —

- (i) the nature of the wound itself from which the court can infer declarant's awareness of pending death.

Regina v. Mulligan (1973), 23 C.R.N.S. 1 (Ont.S.C.)

- (ii) statements as to disposition of property or directions as to funeral

R. v. Spilsbury (1836), 7 C. & P. 187

A statement made while not in a settled hopeless expectation of death may become admissible if reaffirmed by deceased while in such condition.

Debortoli v. The King, [1926] S.C.R. 492 (S.C.C.)

- (d) If the deceased had lived he would have been a competent witness. Therefore, the statement of a deceased mental incompetent or infant would be excluded.

R. v. Pike (1829), 3 C. & P. 598 — 4 year old child's statement excluded

R. v. Perkins 9 C. & C. 395 — 10 year old child's statement admitted

3. Admissions and Confessions: A confession is an admission against interest to a person in authority in a criminal proceeding. All other statements by the accused are admissions.

Also statements “made in presence of the accused” are admissible only if they are necessary to explain that his reaction was, in the circumstances, some evidence of guilt.

See “STATEMENTS” ante

4. **Declarations Made in the Course of Duty:** An oral or written record or statement made by a deceased person in the ordinary routine of his business as a result of his duty to act and to record it is admissible in certain circumstances. The statement or entry is only admissible to prove those facts which the person making the statement or entry was required to record and of which he had personal knowledge. This exception may be duplicated in some instances by Section 30 C.E.A. and Section 35 of **Ontario Evidence Act** re business records. There are five requirements.
 - (a) Declarant must be dead. However, the S.C.C. has allowed in evidence certain notes made by various nurses although nurses were available to give evidence.
Ares v. Venner (1971), 14 D.L.R. (3d) 4 (S.C.C.)
 - (b) Declarant must have been under a specific duty to a third person to have the very thing done and to have made a record or entry of it.
Smith v. Blakey, [1867] L.R. 2 Q.B. 326 (Eng. Ct. Q.B.)
Conley v. Conley, [1968] 2 O.R. 677 (Ont.C.A.)
 - (c) The transaction must have been performed before the record made, not after, and the entries must relate to acts done by the deceased party.
Hart v. Toronto General Trust (1920), 47 O.L.R. 387 (Ont.S.C.)
 - (d) The record must have been made within a reasonably short time after the transaction. This ensures that the events are still fresh in the mind of the recorder.
Price v. Torrington, [1703] 1 Salk. 285
The Henry Coxon, [1873] 3 P.D. 156
 - (e) The declarant was without motive to misrepresent the record.
Hart v. Toronto General Trust (1920), 47 O.L.R. 387 (Ont.S.C.)
5. **Utterance Relevant as to Knowledge or Belief:** Whenever the information goes to establish the recipient's knowledge, belief, good faith, reasonableness, diligence, motive, sanity, etc., irrespective of the truth of the information itself; e.g., action against police officer for false arrest, his defence is reasonable ground to believe that plaintiff had committed an assault. Statements by B & C made to the officer complaining of plaintiff's conduct were admissible.
Phipson on Evidence
- F: Accused's defence to a charge of sedition was that he had been forced into it by people who said they were Communists.
- H: This evidence admitted — it did not matter at all whether the people were in fact communists. What mattered is that the accused believed them when they said they were.
Subramaniam v. Public Prosecutor, [1956] 1 W.L.R. 965 (P.C.)
6. **Statements by Persons Other than Accused:** Sometimes statements by other persons are admissible against accused. Some examples are:
 - (1) In conspiracy prosecutions where the agreement itself is in issue.
Paradis v. The King (1934), 61 C.C.C. 184 (S.C.C.)

(2) Telephone calls from third persons are admissible.

F: Police armed with a search warrant had entered the apartment of the accused whom they suspected of being a bookie. They remained for about an hour, during which time the phone rang several times. Police answered each call and caller either placed a bet or asked about odds on particular horses.

H: The statements by third person callers were admissible and not hearsay — were evidence of character of place.

Regina v. Fialkow, [1963] 2 C.C.C. 42 (Ont.C.A.)

Regina v. McQueen, [1975] 6 W.W.R. 602 (Alta.C.A.)

(3) Inculpatory statements by third persons made in presence of and adopted by accused.

7. Statements in Public Documents: It is based on a confidence in the clergy and generally applies to registers, etc., which are prepared so that interested persons may refer to them for facts, e.g., birth dates.

8. Evidence Through Interpreters: An interpreter in court is hardly giving hearsay when sworn to be a translating machine and tells what witness said only seconds after said in speaker's presence. But if police use an interpreter to secure a confession or other utterance, the interpreter must be called at trial to prove what was said by declarant.

9. Evidence of Witness' Age: Since witness is incompetent to state his own birth date, this must be established by hearsay, e.g., production of birth certificate.

10. Ancient Documents: Coming from proper custody, they are evidence of facts contained therein.

11. Genereal Reputation: The opinion generally held by a great number.

12. Assertions Against Pecuniary or Propriety Interest: Declarations by deceased persons against their pecuniary or propriety interest (e.g., a deceased doctor's statements that his bill has been paid) are admissible as proof of the facts stated. The declarations must be based on facts known by assertor although declaration needn't be contemporaneous with the facts.

Regina v. Agawa & Mallet (1975), 28 C.C.C. (2d) 379 (Ont.C.A.)

Palter Cap Co. v. Great West Life, [1938] O.R. 341 (Ont.C.A.)

13. Declarations of Public or General Rights: Statements or written declarations of deceased persons of competent knowledge made before the course of action arose are admissible to prove ancient, public, or general rights.

14. Various Documents: See DOCUMENTARY EVIDENCE

15. Declarations Against Penal Interest: At common law, an oral or written declaration of a deceased or unavailable witness may be admissible through the recipient of such a statement if certain conditions are met:

(1) The statement should have been made to such a person and in such circumstances that the declarant would have expected penal consequences to follow from the making of the statement, i.e., if made to someone who could not effect the penal consequences it is too unreliable.

(2) The exposure to penal consequences was not too remote.

(3) The declaration in total must be definitely adverse to the declarant.

- (4) When the statement is doubtfully admissible, the court should consider the association of the declarant to the crime and to the accused.
- (5) The declarant must be unavailable by reason of death, serious illness, etc., or beyond the jurisdiction of the court.

Regina v. Demeter (1976), 25 C.C.C. (2d) 417 (Ont.C.A.) approved by S.C.C. at 34 C.C.C. (2d) 137

- (6) The declarant's statement can relate only to his own acts of which he has peculiar knowledge and cannot relate to third party statements made to him.
- (7) The fact must have been to the deceased's immediate prejudice when he made it. If only against his interest in certain future events, it is inadmissible.
- (8) The circumstances must clearly show that the declarant was clearly aware that the making of the statement was contrary to his interest when he made it.
- (9) The statement must be definitely adverse to a proprietary pecuniary interest, not just prejudicial to his reputation or social standing.

Demeter v. The Queen (1977), 34 C.C.C. (2d) 137 (S.C.C.)

Regina v. O'Brien (1977), 35 C.C.C. (2d) 209 (S.C.C.)

If all the circumstances are considered and the statement complies with the requirements, it may be admitted if the declarant is unavailable in a practical sense, i.e., reasonable efforts to secure his attendance have failed.

Regina v. Pelletier (1978), 38 C.C.C. (2d) 515 (Ont.C.A.)

This exception is only available to an accused to exculpate himself, not to the Crown to inculcate him.

Lucier v. The Queen (1982), 65 C.C.C. (2d) 150 (S.C.C.)

IDENTIFICATION

Introduction

Difficulties with identification may arise in cases where, for example, the matter does not come to trial for many months. An officer may be unable to identify the accused after the lapse of time. The following cases demonstrate one method of overcoming this difficulty. Note also that accused, not his counsel, must put correct name before court, at which time Crown should seek to amend Information.

Similarity of Names

Generally, mere similarity of name affords some evidence of identity of a person. When accompanied by other factors such as relative distinctiveness of the name or the fact that it is coupled with an address, or appears on a licence or other documents, its weight is strengthened.

Regina v. McLean (1973), 11 C.C.C. (2d) 568 (N.S.Co.Ct.)

Regina v. Chandra (1976), 29 C.C.C. (2d) 570 (B.C.C.A.)

The similarity of name and address in the evidence and in the Information raises a presumption of identity sufficient to establish a prima facie case.

Regina v. Fedoruk, [1966] 3 C.C.C. 118 (Sask.C.A.)

Regina v. Meikle, [1979] 1 W.W.R. 460 (Alta.Prov.Ct.)

- F: On being stopped by a police officer, the driver of a car produced a driver's licence issued in the accused's name and identified himself by such name. At his trial on a charge of speeding the accused elected not to testify or call any evidence although the police officer was unable to identify the accused as the driver of the car. Accused appealed by way of stated case on the ground that there was no evidence identifying him as the driver.
- H: The accused was properly convicted since the Crown evidence as to identity established a prima facie case and the relevant facts were peculiarly within the accused's own knowledge but he chose not to rebut the Crown's case.
- Regina v. Schryvers, [1963] 2 C.C.C. 287 (B.C.S.C.)
- Regina v. Grainger (1958), 120 C.C.C. 321 (Ont.C.A.) where Roach, J.A. suggests that the accused can call evidence to refute a prima facie case and not just baldly claim evidence is insufficient.
- F: Driver was stopped for U turn on 401 Highway and orally identified himself by name, birth date and address. Had no licence. He was given part of a Uniform Traffic Ticket. Accused or agent appeared in Provincial Court on two occasions and in County Court for appeal for offence of making U turn.
- H: Was sufficient identification even without the accused producing a licence. Evidence as given in facts supra plus fact officer only gave out one ticket to person with same name that day is consistent only with conclusion person named in Summons is accused before Court. He could have refuted the circumstantial evidence by alibi or denial but chose not to and his failure to testify coupled with circumstantial evidence is sufficient.
- Regina v. Easterbrook (1975), unreported (Waterloo Co.Ct.)
- F: Police officer stopped car and driver orally identified himself as Donald A. Brown of Apt. 1209, High Park Ave., Toronto and produced an ownership permit substantiating his oral

identification but no licence. Was convicted in absentia.

- H: Inter alia, was sufficient evidence of identity to convict.
Re Brown and The Queen (1975), 11 O.R. (2d) 7 (Ont.H.C.J.)
- F: On a trial de novo, no witness identified accused in court either by name or by pointing him out. Officer stated he stopped a “Clayton Lively”. Information was against “Clayton Oslo Lively” and Notice of Appeal signed by “Clayton Oslo Lively”. Accused did not testify.
- H: Accused convicted because name is distinctive and identity of name is prima facie evidence of identity; i.e. person stopped is person named in Information and person who signed Notice of Appeal.
Regina v. Lively, [1970] 3 C.C.C. 119 (N.S.Co.Ct.) and cases cited therein.
- F: Accused’s counsel only appeared as agent of accused at trial. No evidence called on behalf of accused and his counsel argued that was no identification of accused.
- H: The same surname given by accused at time of apprehension, on the promise to appear and on the Information in the absence of any evidence that named person was not the actual accused was sufficient evidence of identity to warrant conviction.
Regina v. Meikle, [1979] 1 W.W.R. 460 (Alta. Prov. Ct.) cases cited therein
- F: Officer, who spoke to a person at scene who produced licence and admitted being driver, could not identify that person in court. Name of accused was same as name of accused before court.
- H: Sufficient identity to order retrial.
Regina v. Chandra (1976), 29 C.C.C. (2d) 570 (B.C.C.A.)
- F: A letter was sent by registered mail to an accused. The letter was sent to same person as named in the Summons and the Information.
- H: Proof of the mailing was prima facie proof of receipt of the letter and was sufficient evidence of identity to require new trial.
Regina v. Fedoruk, [1966] 3 C.C.C. 118 (Sask.C.A.)
- A certificate of disqualification or suspension from the Provincial Registrar of Vehicles which named the defendant similarly to the name provided by the defendant to the police is sufficient proof of identity.
Regina v. Wright (1959), 126 C.C.C. 100 (Alta.Dist.Ct.)
Regina v. Greke (1975), unreported (Sask.Dist.Ct.)

Onus of Proof

As identity is an element of every case, unless admitted, the Crown must prove it to the normal standard, i.e., beyond a reasonable doubt. However, in summary conviction matters, when a defendant is voluntarily absent from the trial, evidence of a much lighter degree of proof is sufficient.

Regina v. Meikle, [1979] 1 W.W.R. 460 (Alta. Prov. Ct.) and cases cited therein.

Judge’s Charge

Whenever a case rests completely or substantially on visual identifications of the accused, which identifications are challenged by the defence, the Judge should not as a matter of law

warn the jury of the need for caution before convicting and the reason for the need and relate that it is a possibility that a mistaken witness can be convincing. Judge should direct jury to examine the circumstances in which the identification by witness was made, e.g., lighting, impediments to observation, seen accused before, identification description to police, etc. The Judge may point out to the jury the evidence which is capable of supporting the identification evidence. There is no need to caution jury that it is dangerous to convict on uncorroborated identification evidence. There is no set formula as long as Judge points out the matters tending to weaken the identification evidence.

Regina v. Olbey (1971), 4 C.C.C. (2d) 103 (Ont.C.A.)

Regina v. McCallum (1971), 4 C.C.C. (2d) 116 (B.C.C.A.)

The jury need not be given standard charge as to frailties, etc., if witness knows accused previously.

Regina v. Olbey (1971), 4 C.C.C. (2d) 103 (Ont.C.A.)

Recipients of Description May Relate It

When a witness testifies that he gave a description to police, he may relate the specifics of the description he gave and the officers in chief may relate the descriptions given to them upon which they acted.

Rex v. Clarke (1906), 12 C.C.C. 299 (N.B.C.A.)

Effect of Witness Viewing Photograph

It is acceptable police procedure to show several photographs to a potential witness in order to assist in their investigation. This witness may later testify however the jury should be instructed that the identification evidence of this witness may have been affected by the photograph and its weight thereby lessened.

Regina v. Mingle, [1965] 2 O.R. 753 (Ont. Mag. Ct.)

Regina v. Sutton, [1970] 3 C.C.C. 152 (Ont.C.A.) and cases cited therein.

Photographs shown to witnesses should not convey information that the accused has a criminal record.

Rex v. Dean (1942), 77 C.C.C. 13 (Ont.C.A.)

It is not objectionable to show that a photograph of the accused was in the possession of the police when shown to the potential witness.

Rex v. Watson (1944), 81 C.C.C. 212 (Ont.C.A.)

Identification Evidence Should Be Cumulative and Specific

An identification witness should provide more evidence than a single physical trait of the accused. Also a vague general description which fits many persons is insufficient.

Rex v. Yates (1946), 85 C.C.C. 334 (B.C.C.A.)

Rex v. MacDonald (1951), 101 C.C.C. 78 (B.C.C.A.)

A mere statement from the witness box to the effect "that is the man" is only a vague opinion and insufficient evidence of identification. The attention of the witness should be directed to specific features of the perpetrator such as his height, weight, bearded or clean-shaven, hair colour, hands, walk et cetera. Then when as complete a profile as possible has been constructed, the witness be asked to identify the perpetrator. An identification is the sum of all

the unique characteristics of a person and the more details that can be provided, the more weight it can be given.

Rex v. Browne and Angus (1951), 99 C.C.C. 141 (B.C.C.A.)

Regina v. Smith (1952), 103 C.C.C. 58 (Ont.C.A.)

Other Evidence to Support Identification Evidence

“It is not questioned that although a physical description may not in itself contain enough elements to identify, nevertheless, when connected with other incidents bearing more or less directly on the case, including conduct of an incriminatory character, there may arise such a network of inculpatory circumstances, that the cumulative effect establishes identification with a convincing degree of practical certainty.”

Rex v. Yates (1946), 85 C.C.C. 334 at 339 (B.C.C.A.); approved in Rex v. Robinson & Kosowan (1947), 88 C.C.C. 257 (Ont.C.A.) where articles taken from victim found in premises where accused had been.

Admission by Accused of Presence

When an accused admits to be present at a scene or when others place him there, the identification evidence is strengthened and corroborated.

Regina v. Cosgrove (December 7, 1976), unreported (Ont.C.A.)

Impairment of Eyesight

A 77 year old witness who had poor vision identified 3 accused whom she saw intermittently only by moonlight over a period of two hours while they ransacked her house. Defence was alibi. The conviction was sustained as there was sufficient evidence of identification.

Rex v. Zarichney et al. (1936), 65 C.C.C. 214 (Man.C.A.)

Presence of Accused in Court

Trial court has the right to compel an accused to appear personally in court and to identify himself in open court. This right applies to all summary conviction matters (and semble to P.O.A. matters — see sections 51 and 52.)

Re Conrad and The Queen (1973), 12 C.C.C. (2d) 405 (N.S.S.C.)

A Judge on a preliminary hearing may exclude members of the public from the courtroom even when identity is an issue. The accused is not entitled to have similarly appearing associates remain in the courtroom.

Re Regina and Grant (1974), 13 C.C.C. (2d) 495 (Ont.H.C.J.)

Conduct of Tracking Dog

Apparently evidence as to the actions of a tracking dog is admissible if groundwork is laid, e.g., dog's training, experience et cetera.

Regina v. Billings (October 7, 1976), unreported (Ont. C.A.)

Use of Photographs to Refresh Memory or Cross-examine Hostile Witness

If a witness identifies a photograph extrajudicially and then refusing to do so at trial is declared hostile, Crown may use photograph to refresh his memory or cross-examine him.

Astroff v. The King (1931), 56 C.C.C. 263 (Que.K.B.Appeal Side)

Identification as Part of Res Gestae

Identification evidence of a witness not called or unable to identify accused at trial can be adduced through a third person who is testifying, e.g., “A. told me that B. assaulted him”, as part of the res gestae.

Regina v. Nye & Loan (1978), 66 Crim.App. R. 252 (Eng. C.A.) See RES GESTAE *infra*

Expert Evidence

Testimony by an expert (in psychology and criminology) as to difficulty of witness making observations during stressful situations, etc., is inadmissible as of no assistance to triers of fact.

Regina v. Lindo (October 1, 1976), unreported (Ont.Co.Ct.)

JUDICIAL NOTICE

Introduction

Generally a judge may not act on facts which have not been adduced in court. However, there are certain matters which are so easily proved by consulting some authoritative source or are too notorious to require formal proof that they may be juridically noticed, i.e., the court will recognize their existence without the requirement of any evidence.

The test which has been accepted by the courts is:

“The party seeking judicial notice has the burden of convincing the judge that (a) the matter is so notorious as not to be the subject of dispute among reasonable men or (b) the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy.”

Regina v. Quinn (1976), 27 C.C.C. (2d) 543 (Alta.S.C.) at 546 quoting Morgan, “Judicial Notice”, (1944) 57 Harv. L. Rev. 269.

Therefore, where the point in question is known at once with certainty by all reasonably intelligent people in the community or where they would agree that the facts are verifiable by looking at authoritative books of reference, the point can be judicially noted.

“It is our duty, as judges, to take judicial notice of facts which are known to intelligent persons generally.”

Reference *Re Alberta Legislation*, [1930] S.C.R. 100 at 128 (S.C.C.) per Chief Justice Duff.

Facts Judicially Noticed After Reference to Sources

1. “Bighorn sheep” are “mountain sheep” within the meaning of Wildlife Act.
Regina v. Quinn (1976), 27 C.C.C. (2d) 543 (Alta.S.C.)
2. Camels are domestic animals.
McQuaker v. Goddard, [1940] All E.R. 491
3. The date of the outbreak or the conclusion of war.
R. v. Botrill, [1946] 2 All E.R. 434

Facts Judicially Noticed Because Were Widely Known

1. It is possible for a couple to have sexual intercourse on the floor/front seat of a truck.
Yuill v. Yuill, [1945] 1 All E.R. 183
 2. A “Dodge Sedan” is a motor vehicle.
Regina v. Smith (1957), 119 C.C.C. 227 (N.S.S.C.)
 3. Cats are ordinarily kept for domestic purposes.
Nye v. Niblett, [1918] 1 K.B. 23
 4. The prevalence of disturbances and unruly conduct of some of the younger element in shopping plaza parking lots and elsewhere where the public are often gathered in relatively large groups.
Re Regina and Shaben et al. (1972), 8 C.C.C. (2d) 422 at 426 (Ont. H.C.J.)
 5. Of geographical locations.
- F: On a trial for careless driving the evidence adduced gave the location where the offence

took place to be “in a Westerly direction on Number 22 Highway between 1 and 1-½ and 3 miles West of Hickory Corners” no evidence was adduced as to the geographical location of Hickory Corners other than that it was on Highway 22 between Sarnia and London, nor that Hickory Corners was within the territorial jurisdiction of the Magistrate’s Court for the County of Middlesex, nor that the occurrence took place in the Township of Adelaide or County of Middlesex as charged. The learned Magistrate held that he could take judicial notice of the fact that Hickory Corners and an area of at least 4 miles around Hickory Corners is within Middlesex County.

- H: “It is surely notorious to persons living in Southern Ontario that Highway 22 is the Highway that connects Sarnia with London. There could only be one Hickory Corners located on that Highway and in my opinion the learned Magistrate who had jurisdiction for the County of Middlesex could take cognizance of the fact which no doubt would be notorious to him that Hickory Corners was located on Highway Number 22 and was within the boundaries of the County of Middlesex”. “It cannot be said that he, the accused, was misled or prejudiced in his defence by the failure of the Crown to prove in evidence the actual location where the offences took place. The right and justice of the matter is that the accused knew exactly what he was charged with and where it was alleged the offence was committed.”
Regina ex rel White v. Fudell (1956), 116 C.C.C. 67 at 71 and 72 (Ont.H.C.J.)
- F: Where the evidence was that the offence occurred at “the tower at Unionville” which was located 2 miles outside the Village where the Magistrate was hearing the case.
- H: Formal proof that the tower was in the Township was unnecessary.
Regina v. Bednarz (1961), 130 C.C.C. 398 (Ont.C.A.) approving *R. v. White v. Fudell*
- F: Location on a charge of possession of a weapon dangerous was given in the Information as “at the Township of Thurlow, in the County of Hastings”. At trial the evidence indicated simply that the offence was committed in Cannifton but there was no evidence to indicate in which Township Cannifton was located. The trial Judge had held that he could not take judicial notice of the location of Cannifton and then therefore dismissed the charges.
- H: “The trial Judge ought to have taken judicial notice of the fact that Cannifton was in Thurlow Township and that therefore he ought to have convicted the accused.”
Regina v. Bridge et al. (1976), 9 O.R. (2d) 148 Blue Pages (Ont.C.A.)
- F: The location in the Information was named the Township of Eby, in the District of Temiskaming. However, the evidence did not refer to the Township, but described it as occurring within 5 miles of a particular highway intersection.
- H: The Court was entitled to take judicial notice of the fact that the offence was within the Township of Eby and District of Temiskaming as charged.
Regina v. Brown (1962), 133 C.C.C. 89 (Ont.Dist.Ct.)
- The City of Toronto is in Canada.
Rex v. Cerniuk (1947), 91 C.C.C. 56 (B.C.C.A.)
- F: Accused was charged with the offence of speeding in a city, town or built-up area. The evidence was that the offence occurred on a main street near a Kentucky Fried Chicken shop. The accused lived in the area for some 20 years and was familiar with it.
- H: “It is clear that the location is an essential ingredient of this offence. The Court must be satisfied in order to convict that the offence occurred in a City, Town, Village, Police

Village or other built-up area. Normally this would require evidence, especially if there was a dispute as to this matter, but I do not believe that evidence must be given in all cases, especially where it is so obvious to everyone that the offence has occurred within such an area. One should not be required to prove the blatantly obvious. It is only where there is some dispute or some possible disagreement about whether the location is within such an area or whether it is not.”

Regina v. Redlick (1978), 41 C.C.C. (2d) 358 (Ont.H.C.J.)

- F: There was no evidence at trial that the case was being tried before the court nearest to the place where the offence occurred.
- H: The court will take judicial notice of geographic features and well-known places within its jurisdiction such as the county seat.
Rex v. Zarelli & Newell (1931), 55 C.C.C. 314 (B.C.C.A.)
- F: Defendant was charged with speeding on a driveway controlled by the National Capital Commission. Was no evidence adduced as to who controlled or managed the road at the site of the offence.
- H: The trial court properly took judicial notice of the status of the driveway in this matter. This was commonly known in the community where the offence was tried and is to be determined by the common knowledge of that community. This common knowledge may be personally known and shared by the local court or, if not, evidence of the community's common knowledge may be adduced to allow judicial notice to then be taken.
Regina v. Potts (1982), 66 C.C.C. (2d) 219 (Ont.C.A.) leave to appeal to S.C.C. refused May 17, 1982.

Matters of Law

Many statutes provide that statutes, ordinances, proclamations, notices et cetera be admitted into evidence and are evidence of the contents thereof. In addition judicial notice must be taken of them after publication in the Gazette.

Ontario Evidence Act, R.S.O. 1980, see for example Sections 25-29, 36.

Ontario Interpretation Act, R.S.O. 1980, Section 7.

Ontario Regulations Act, R.S.O. 1980, Sections 1-5.

Canada Evidence Act, Sections 20, 21, 22 and 23.

Canada Interpretation Act, Section 17.

Regina v. Steam Tanker (1976), 27 C.C.C. (2d) 241 (S.C.C.)

As to court documents, the court has at all times the authority to look at its own records, and take notice of their contents, although they may not be formally brought before the court by affidavit or production otherwise.

Craven v. Smith, [1869] L.R. 4 Ex 146

Rex v. Lewis (1941), 77 C.C.C. 95 (B.C.C.A.)

Re Stewart and The Queen (1976), 8 O.R. (2d) 588 (Ont.Co.Ct.)

The effects of legislation can be ascertained by applying it prospectively to known facts and circumstances. For example, a proposed tax on banks would be prohibitive and make it impossible for them to carry on business and proposed restrictions on the freedom of the press were judicially noticed as contrary to the proper working of a Parliamentary system.

The Matter of Three Bills passed by Alberta Legislature, [1938] S.C.R. 100 (S.C.C.)

Facts Not Judicially Noticed:

1. The workings of a radar device were not sufficiently well known as to be capable of judicial notice.
Regina v. Waschuk (1970), 1 C.C.C. (2d) 463 (Sask.Q.B.)
2. The exact location of the city limits where the speed limit changes was not posted nor was it so widely known as to be an accepted geographical fact.
Regina v. Eagles (1976), 31 C.C.C. (2d) 417 (Ont.H.C.J.)
3. The passage of a bylaw designating a certain street as a “through street” must be proved.
Regina v. Snelling, [1952] O.W.N. 214 (Ont.H.C.J.)
4. Foreign law which must be proved by experts such as lawyers from the foreign jurisdiction.
Re Low, [1933] 2 D.L.R. 608 (Ont.C.A.)

MISTAKE OF FACT

Introduction

This defence applies to crimes where intention (*mens rea*) or recklessness must be proved. Originally it was required that the mistake be honestly held and reasonable in the sense that an average man would also have honestly believed the same facts if he had been in the same situation as the accused. More recently the courts have stressed the need to ascertain the honesty with which the erroneous belief has been held. The reasonableness of the mistaken belief is now to be considered mainly in determining whether the belief was honestly held. In other words, it would be difficult for a court to accept a bizarre and fanciful belief and subscribe to the defence that it was actually and honestly held. Conversely the more reasonable and more usual the grounds for the mistaken belief, the more likely a person would be to honestly think his actions were innocent.

As with other defences, there must exist some evidentiary basis upon which the defence of an honest but mistaken belief can succeed.

Defined

“At common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the prisoner is indicted an innocent act which has always been held to be a good defence.”

Regina v. Tolson (1889), 23 Q.B. D. 168 per Cave, J. at 181 (English Court for Crown Cases Reserved)

“The (mistake of fact) defence may be stated in this way.” A bona fide, honest, and reasonable belief based on reasonable grounds of the existence of circumstances which, if true, would make the act for which the prisoner is indicted, an innocent act, is a good defence.”

Regina v. McAuslane, [1968] 1 O.R. 209 (Ont.C.A.) per MacKay, J. A. for the court at 212 and 213

“... the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining such essential question.”

Regina v. Rees (1956), 115 C.C.C. 1 at 11 (S.C.C.) per Cartwright, J.

Beaver v. The Queen (1957), 118 C.C.C. 129 (S.C.C.)

Pappajohn v. The Queen (1980), 52 C.C.C. (2d) 481 (S.C.C.)

Evidentiary Onus on Defendant

This defence must only be considered if there exists some evidential basis beyond the mere statement of mistaken belief by the defendant. This additional evidence must appear from or be supported by sources other than the accused to give the defence any air of reality.

Pappajohn v. The Queen (1980), 52 C.C.C. (2d) 481 (S.C.C.)

Examples of Mistake of Fact:

- F: Wife was deserted by her husband and was informed by reliable persons that he had been lost at sea. She remarried after five years and her first husband then reappeared. She was charged with bigamy.
- H: Not guilty because of her belief in good faith and on reasonable grounds that her first

husband was dead.

R. v. Tolson (1889), 23 Q.B.D. 168 (English Court for Crown Cases Reserved) confirmed in R. v. King, [1963] 3 All E.R. 561 (Eng. Ct. of Crim. App.)

- F: Accused had been convicted of knowingly or wilfully doing an act contributing to the delinquency of a child by having sexual intercourse with a 16 year old girl (age of majority was 18 in B.C. at the time). She had told him she was 18 years old, had consented to the intercourse and looked even older. Accused believed her to be over 18.
- H: Verdict of acquittal entered because in an offence to “knowingly or wilfully” do an act, it is a defence that an accused honestly and reasonably believed the girl was over 18. The inclusion of the words “knowingly or wilfully” imparts the necessity of proving mens rea to all the elements of the charge including the juvenile’s age and an honest, reasonable mistake by the accused as to her age is a valid defence.

Regina v. Rees (1956), 115 C.C.C. 1 (S.C.C.)

- F: Accused was charged with assaulting a peace officer. The evidence indicated that a police officer, in plain clothes, in breaking up a fight between the accused and another was struck by the accused. Accused testified that he did not realize the complainant was a police officer because he was not in uniform and the noise prevented him from hearing the officer identify himself as such. The Magistrate found that the accused did not know the complainant’s status.
- H: Accused rightly acquitted because knowledge by the accused that the victim of the assault was a peace officer is an essential ingredient and it is a well established principle of law that mistake of fact may be an excuse where the accused acts under an honest and reasonable belief in a state of things which if it had really existed would have made the act not criminal.

Regina v. McLeod (1955), 20 C.R. 281 (B.C.C.A.)

An accused charged with rape who honestly believes that the complainant consented, even if this belief is not reasonable is entitled to be acquitted.

Pappajohn v. The Queen (1980), 52 C.C.C. (2d) 481 (S.C.C.)

Note: Later sexual assault provisions have modified this doctrine.

Accused possessed and then sold an illegal drug believing it was only milk sugar. He was guilty of the sale of a drug or something which he represented as a drug. However, he was entitled to a new trial to put forward his defence that he honestly believed that the substance was not illegal when he was in possession of it.

Beaver v. The Queen (1957), 118 C.C.C. 129 (S.C.C.)

- F: Accused, charged with possession of (or trafficking in) one prohibited drug, e.g., opium, mistakenly believed the substance to be another different prohibited drug, e.g., hashish.
- H: This mistake of fact is no defence where the evidence shows the accused knew that the substance he had in his possession was any drug the possession of which was contrary to statute.

Regina v. Burgess, [1970] 3 C.C.C. 268 (Ont.C.A.)

Regina v. Custeau (1972), 6 C.C.C. (2d) 179 (Ont.C.A.)

- F: Accused were charged under the **Criminal Code** with driving while their licences were suspended. The suspensions resulted from provincial legislation which automatically

suspended their licences upon a conviction of a criminal drinking-driving offence. They had no knowledge of the suspension when they drove.

- H: Acquittals upheld because their ignorance of the suspensions was a mistake of fact and negated the mens rea for the offence of driving under suspension.

Regina v. Prue; Regina v. Baril (1979), 8 C.R. (3d) 68 (S.C.C.)

Examples Where Mistake of Fact Rejected:

Cases Where Defence of Mistake of Fact has Failed

- F: Accused had been convicted of possession of obscene books for purposes of distribution, was a principal in and responsible for the overall management of the operations of a limited company which distributed books and magazines through retail shops in Ontario. His chief responsibility was distributing the approximately 300 new titles received from publishers each month. All ordering and invoicing was done by code number rather than by title or subject matter.
- H: Conviction affirmed because accused was in law in possession of the books and the defence of mistake of fact was not open to the accused because he had not established that he had reasonable grounds for believing that the books did not contain obscene matter.
- Regina v. McAuslane, [1968] 1 O.R. 209 (Ont.C.A.)
- F: Defendant charged under provincial statute with driving while licence suspended. He was unaware of suspension when driving.
- H: Appeal from acquittal allowed and new trial ordered. This lack of knowledge of the suspension is a mistake of law in that the defendant simply was unaware of the Registrar's revocation of his licence which revocation operates as a result of statutory law. This was therefore a mistake of law on the defendant's part and is no defence to this strict liability offence.
- Regina v. MacDougall (1982), 44 National Reporter 560 (S.C.C.)
- F: An accused charged with speeding honestly believed he was not exceeding the speed limit. His speedometer was faulty.
- H: Because speeding is an absolute liability offence, this defence of mistake of fact is not available.
- Regina v. Hickey (1977), 30 C.C.C. (2d) 416 (Ont.C.A.)

Mistake of Fact in Provincial Offences

In those very rare provincial offences requiring full mens rea, an honest, though mistaken, belief in a set of facts that, if true, would have rendered the defendant's conduct innocent, will provide a defence if an evidentiary basis is provided.

In absolute liability offences, the defence is not available.

Regina v. Hickey (1977), 30 C.C.C. (2d) 416 (Ont.C.A.)

In strict liability offences where the defence of due diligence applies, one element of that defence is a reasonable belief in a mistaken set of facts and therefore a mistake of fact defence may be advanced.

Regina v. MacDougall (1982), 44 National Reporter 560 (S.C.C.)

MISTAKE OF LAW

Introduction

This occurs when a person with full knowledge of the facts comes to an erroneous conclusion as to their legal effect. It is not a defence and only has significance as a matter which may be taken into account in mitigating sentence. “We cannot hold that in the view of a court of justice mere ignorance of the law forms an excuse. The laws can only be administered upon the principle that they are known, because all are bound to obey them, a principle which lies at the foundation of all such cases”.

R. v. Moodie (1861), 20 U.C.Q.B. 389 per Robinson C.J.

This principle of ignorance or mistake of law covers the interpretation, existence, scope and application of the law. It prevents a defence of wrongful interpretation as well as ignorance of a law's existence.

Molis v. The Queen (1981), 55 C.C.C. (2d) 558 (S.C.C.)

Provincial Offences Act

See Section 81

Due Diligence

Ignorance of the law is no defence for a person who exercised due diligence to ascertain the existence of the law.

Due diligence applies to the fulfilling of a duty imposed by law, not to the existence or interpretation of a law.

Molis v. The Queen (1981), 55 C.C.C. (2d) 558 (S.C.C.)

An Enacted Statute as Opposed to a Regulation

When the offence charged is based upon subordinate legislation such as a regulation, no person shall be convicted of a contravention unless the regulation has been published in the Canada Gazette or reasonable steps have been taken to bring it to the attention of the persons affected by it.

Interpretation Act, R.S.C. section 27(2)

Statutory Instruments Act, R.S.C. section 11(2)

Molis v. The Queen (1981), 55 C.C.C. (2d) 558 (S.C.C.)

See also Regulations Act, R.S.O. Chapter 446 to same effect in relation to Provincial legislation.

Examples of Mistakes in Law

1. A defendant charged with a provincial offence of driving while his licence was suspended who was unaware of the actual suspension and believed he required notice before the suspension was effective made a mistake in law, i.e., he erred in not appreciating the legal duty of the Registrar to suspend.
Regina v. MacDougall (1982), 44 N.R. 560 (S.C.C.)
2. F: An accused dancer relied on a Judge's decision in a similar case which allowed nude dancing. This decision was overturned after her performances.
H: Her conviction was upheld. “Her mistake, if she made any mistake, was in concluding that a statement of law, expressed by Riley J., was the law. That is not a mistake of

fact, that is a mistake of law. It is a mistake of law to misunderstand the significance of the decision of a judge, or of his reasons. It is also a mistake of law to conclude that the decision of any particular judge correctly states the law, unless that judge speaks on behalf of the court of ultimate appeal.”

Regina v. Campbell et al. (1973), 21 C.R.N.S. 273 at 278 (Alta.D.C.)

3. F: Accused inquired of customs officers as to the legality of importing gambling devices. He received no reply and he imported them for two years without any difficulties.

H: He was guilty because his belief that the devices were not illegal was simply ignorance of the law. However this erroneous belief based on the noninterference by customs officers mitigated the penalty.

Regina v. Potter (1978), 39 C.C.C. (2d) 538 (P.E.I.S.C.)

4. F: Accused continued to manufacture a restricted drug after it was added to a schedule by regulation published in the *Canada Gazette*.

H: Conviction upheld as his ignorance (i.e., mistake) of law is no defence as the existence of the regulation and its publication precluded it.

Molis v. The Queen (1981), 55 C.C.C. (2d) 558 (S.C.C.)

5. F: Defendant erroneously paid fines to Ministry of Transport instead of the Provincial Offences Court. When she later received a notice of her licence suspension, she inquired and was advised to delay driving a few days. Later she was driving and charged with driving while her licence was suspended.

H: Defendant was operating under a mistake of law as to the Registrar's duty and the defendant's right to drive. Ignorance of the law is no excuse especially in jurisdictions such as Ontario where that principle has been codified nor is officially induced error as a defence applicable.

Regina v. Robertson (1984), 30 M.V.R. 248, 43 C.R. (3d) 39 (Ont. Prov. Ct.)

OPINION EVIDENCE

Introduction

The opinions, inferences and beliefs of lay persons are generally inadmissible. However, there are exceptions to this principle, and an ordinary witness may be permitted to give his opinion on matters of personal or common experience such as:

- (1) Identity of a perpetrator or other person.
Rex v. Minichello (1939), 72 C.C.C. 413 (B.C.C.A.)
Rex v. German (1947), 89 C.C.C. 90 (Ont.C.A.)
- (2) General health
- (3) Speed of a vehicle
Rex v. German, *supra*
- (4) Time, distance and quantity
Cross, Evidence 5th ed. (1979) p. 442
- (5) Apparent age, appearance and demeanour of a person
Rex v. German, *supra*
- (6) Temperature and weather
- (7) Intoxication and whether a person was in a fit condition to drive a car.
Rex v. German, *supra*
Re Regina v. Beauvais, [1965] 3 C.C.C. 281 (B.C.S.C.)
Graat v. Regina (1980), 17 C.R. (3d) 55 (Ont.C.A.)
- (8) Handwriting of another person if the witness:
 - (a) saw the party actually write.
Alexander v. Vye (1889), 16 S.C.R. 501 (S.C.C.) or
 - (b) regularly received written communications from him or observed his handwriting in the ordinary course of business.
Pitre v. Rex, [1933] S.C.R. 69 (S.C.C.)
- (9) Value of things that an ordinary person would be knowledgeable about.

Expert Evidence

After proper qualification, an expert may be allowed to state opinions. However these opinions may only be given in the area of the particular expertise of the witness. The basic test as to whether a person will be allowed to give “expert” evidence is whether he is sufficiently knowledgeable to assist the court.

An “expert” is a person who has special knowledge in a particular field by virtue of his training or his experience. Mechanics and other workmen who are skilled in their trades may be entitled to give opinion evidence.

Rice v. Sockett (1912), 8 D.L.R. 84 (Ont.Div.Ct.)

The test is — “is he skilled and has he adequate knowledge?” The degree of each merely

goes to the weight of the evidence. Other matters such as practical experience also go to weight, not admissibility.

Regina v. Godfrey (1975), 18 C.C.C. (2d) 90 (Alta.C.A.), application to appeal to S.C.C. dismissed.

Regina v. Morgentaler (No. 2) (1974), 14 C.C.C. (2d) 450 (Que.Q.B.)

It is important to note that not all expert evidence is opinion evidence. For example, the testimony of a garage operator as to his knowledge of a particular vehicle maintenance practice usually followed by mechanics was not opinion evidence but rather factual evidence of a general practice.

Fagnan v. Ure et al., [1958] S.C.R. 377 (S.C.C.)

“The court must look not only to the witness himself, to consider whether he is a professional or other expert, but even more to the character of his evidence to decide whether it is in the category of opinion evidence.”

Regina v. de Tonnancourt et al. (1955), 114 C.C.C. 240 (Man.Q.B.); affirmed 115 C.C.C. 154 (Man.C.A.)

Procedure for Testimony of Expert:

1. Establish the need for the expert testimony to assist the court in arriving at a correct judgment based upon the expert's special knowledge.
2. It is rarely advisable to have an opponent simply concede the qualifications of your expert and thereby deprive the court of the expert's impressive background and training. This information may greatly assist the court if an opponent later tenders his own expert who may be less qualified.
3. Qualify the witness. This should be done by leading questions and should elicit such background and foundation evidence as his academic training, his certification in the specialized area, an explanation of his specialty, his association with professional groups, his authorship of books or articles, his practical experience, his previous court appearances when he was allowed to give opinion evidence et cetera.
e.g., “I understand that you graduated in . . . from the University of . . . with the degree of . . .”
“After university you did post-graduate studies in . . . at . . .”
“You have written articles for the following publications . . .”
“You have been qualified to practice your profession in the Province of Ontario since . . .”
“You are presently employed on the staff of . . .”
“You have given expert evidence in the area of . . . in . . . courts within this province.”
“Where” “When” “Et cetera”
4. Opponent given opportunity to cross-examine expert as to his qualifications.
5. Submit witness qualified as an expert to give opinion evidence.
6. Adduce the factual evidence upon which the expert will base his opinion. This opinion may be based on personal observations, upon facts not in dispute or upon facts in dispute. In the latter case, the proper course is to ask a hypothetical question based on the assumption of certain facts as if they existed.
e.g., “In your opinion what would the effect of the presence of a bus, following less than one hundred feet behind the defendant's car, have on the operation of this radar device?”

Admissibility of Hearsay Statements

An expert's opinion may be based on examinations of persons. These examinations may

include oral conversations with the person. The expert should relate these conversations as they form part of the grounds upon which he based his opinion. Such statements made to the expert and related by him are hearsay evidence and cannot be treated as factually true unless proven independently of the expert.

Abbey v. The Queen (1982), 68 C.C.C. (2d) 394 (S.C.C.)

Regina v. Dietrich (1971), 1 C.C.C. (2d) 49 (Ont.C.A.)

Regina v. Rosik (1971), 2 C.C.C. (2d) 351 (Ont.C.A.)

Regina v. Potvin (1972), 16 C.R.N.S. 233 (Que.C.A.)

Regina v. Warren (1974), 14 C.C.C. (2d) 188 (N.S.C.A.)

There is no privilege which attaches to the communications made by an accused to an expert (usually a psychiatrist) who examines him.

Therefore such an expert must disclose the statements made to him by the accused and upon which he bases his opinion.

Regina v. Potvin (1972), 16 C.R.N.S. 233 (Que.C.A.)

Regina v. Warren (1974), 14 C.C.C. (2d) 188 (N.S.C.A.)

If the statements made by a defendant and upon which an expert has based his opinion are untrue, then the foundation of the opinion is gone (and jury should be so instructed).

Regina v. Rosik (1971), 2 C.C.C. (2d) 351 (Ont.C.A.)

Maximum Number of Experts

Section 12 of the **Ontario Evidence Act** limits the number of witnesses to be called by each side to three. Section 5 of the **Canada Evidence Act** provides for a maximum of 5 expert witnesses.

Leave must be sought of the trial Judge to call more than the designated number, such permission may be granted even after one or more have been called.

Reid v. Watkins, [1964] 2 O.R. 248 (Ont.H.C.J.)

It is suggested that in any case where extensive expert testimony may be required, permission be sought to call more than the statutory number before the trial commences.

Opinion As to the Ultimate Issue

There has been much controversy about the admissibility of opinion evidence on the very issue that the court is to decide. In Ontario, it appears that the preponderance of authority allows such evidence. For example witnesses, either qualified experts or laymen, if within the exceptions given above (see INTRODUCTION), have testified as to:

1. Intoxication

Rex v. German (1947), 89 C.C.C. 90 (Ont.C.A.)

- Graat v. Regina (1980), 17 C.R. (3d) 55 (Ont.C.A.)
2. The capacity of an accused's knowing right and wrong and the nature and quality of his act on an issue of insanity.
Rex v. Mackie (1933), 59 C.C.C. 254 (Man.C.A.)
 3. That accused was repulsed by homosexual activities.
Regina v. Lupien, [1970] 2 C.C.C. 193 (S.C.C.)
 4. Capacity of accused to form intent.
Fisher v. The Queen, [1961] S.C.R. 535 (S.C.C.)
 5. Psychiatrist's opinion as to veracity of accused.
Regina v. Rosik (1971), 2 C.C.C. (2d) 351 (Ont.C.A.)

However, it has been held that witnesses should not have testified to matters that are questions of law or an application of a law to the facts. For example:

1. "this was a sexual homicide or a sadistic homicide"
Regina v. Ortt, [1968] 4 C.C.C. 92 (Ont.C.A.)
2. Accused was a criminal sexual psychopath because this was the very matter to be decided by the court.
Regina v. Neil (1957), 119 C.C.C. 1 (S.C.C.)
3. As to where victim's hands were held when mortal wound received.
Regina v. Kuzmack (1954), 110 C.C.C. 338 (Alta.C.A.)

Conflicting Expert Evidence

The court is not bound to accept expert evidence. If there is conflicting expert testimony and the court finds each expert equally believable, it is not proper to simply decide that the experts have cancelled each other out, and dismiss the case. The Court should look at all the other evidence, view the theories of the experts in light of that evidence, and make a decision.

Gallant et al. v. F. W. Woolworth Co. Ltd. et al. (1971), 15 D.L.R. (3d) 248 (Sask.C.A.)

Where expert testimony is conflicting, a court may disregard all or part of it. Even if the expert evidence is uncontradicted or in agreement, the court may reject it although this is unlikely.

Rex v. True (1922), 16 Cr. App. R. 164 at 167-168.

Who Found To Be Expert:

1. Psychiatrist testifying as to capacity, intent or insanity.
Regina v. Rosik (1971), 2 C.C.C. (2d) 351 (Ont.C.A.)
2. A psychiatrist testifying as to an accused's veracity.
Regina v. Rosik, *supra*.
3. A medical doctor with very limited and ancient practical experience who testified as to abortions and medical matters related thereto.
Regina v. Morgentaler (No. 2) (1974), 14 C.C.C. (2d) 450 (Que.Q.B.)
4. A fingerprint expert who testified that he found no fingerprints is nevertheless an expert.
Rex v. Barrs (1946), 86 C.C.C. 9 (Alta.C.A.)
5. An expert in crime detection with training in photographic work, who by means of an

infra-red light and films, identified an obliterated typewritten address is an expert entitled to give opinion evidence. Also a police constable trained in chemistry, toxicology and spectrographic analysis who produces spectrograms prepared by him and from which he identifies the similarity of various materials connecting accused with crime.

Rex v. Barrs (1946), 86 C.C.C. 9 (Alta.C.A.)

6. A solicitor or other qualified person who can give the effect, interpretation and full meaning of foreign law.
Re Low (1933), 59 C.C.C. 346 (Ont.C.A.)
7. A psychiatrist who had studied sexual behaviour who testified as to normalcy of cunnilingus in community.
Regina v. St. Pierre (1974), 17 C.C.C. (2d) 489 (Ont.C.A.)
8. A police officer qualified in operation of breathalyzer machine and who had done controlled experiments with people who consumed alcohol could testify as to the physiological effects of alcohol upon the human body.
Regina v. Bunniss (1965), 44 C.R. 262 (B.C.Co.Ct.)
9. A pharmacologist who testifies as to the effects of the consumption of drugs on the human mind (but not as to accused's capacity to form an intent).
Regina v. Woods and Feuerstein (1982), 65 C.C.C. (2d) 554 (Ont.C.A.)
10. A physician who testified that injuries of abused child were not accidentally caused.
Regina v. Iutzi (1980), 5 W.C.B. 84 (Ont.H.C.)
11. Cement and general contractors have been accepted (as well as a farmer) as experts to give opinions regarding silo construction because they have expertise in these technical skills gained from experience.
Rice v. Sockett (1912), 8 D.L.R. 84 (Ont.Div.Ct.)

Who Found Not To Be Expert:

1. A medical doctor without any specialized training or experience who improperly testified as to an accused's insanity.
Rex v. Keirstead (1918), 30 C.C.C. 175 (N.B.C.A.)
2. An identification officer who took pictures and measurements at a scene based upon which he drew a sketch or plan. His evidence was merely descriptive of what he saw.
Regina v. de Tonnancourt et al. (1955), 114 C.C.C. 240 (Man.Q.B.) affirmed 115 C.C.C. 154 (Man.C.A.)
3. A police officer called to prove continuity of exhibits.
Regina v. de Tonnancourt et al., supra.

Value of Some Expert Evidence

"The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmations of preconceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will" per Adamson C.J.M. at 168, 169 in *Regina v. de Tonnancourt et al.* (1956), 115 C.C.C. 154 (Man.C.A.) quoting from and approving Phipson's *Law of Evidence*, 9th ed., p. 403.

Opinions To Be Based Upon Hypothetical Situations

If the expert has personally examined the person, he may give his opinion based upon his observations.

However, if the facts upon which the opinion is based are disputed, he must give his opinion only upon a hypothetical fact situation. Only when the factual basis is not disputed can the expert relate his opinion directly to the person or object about which he is expressing an opinion.

Regina v. Fisher (1961), 34 C.R. 320 (Ont.C.A.)

Bleta v. The Queen, [1964] S.C.R. 561 (S.C.C.)

Regina v. Swietlinski (1979), 22 O.R. (2d) 605 (Ont.C.A.)

Evidence in Addition to Experts

A court is entitled to consider all the evidence relative to the issues in the matter and may apply its own experience in arriving at the verdict.

Indeed, in certain circumstances, there is no need to consider expert opinion evidence because the average person knows from his own experience the very matter about which the expert has testified.

Regina v. Smithers (1976), 9 O.R. (2d) 127 (Ont.C.A.)

PARTICULARS

Introduction

When the count does not provide the defendant with sufficient information to adequately defend himself, the defendant may make a motion for particulars of the offence to be supplied to him by the Crown. An otherwise valid and sufficient count may be too vague or uncertain to provide a sufficient informational basis for a defendant's preparation of his defence.

Provincial Offences Act

See Sections 36, 37 and 38.

Discretionary Order

The granting or refusing of particulars rests with the court. An accused is not entitled to particulars as of right and the court's decision will rarely be disturbed on an appeal.

Rex v. Griffin (1955), 63 C.C.C. 286 (N.B.C.A.)

When Particulars Can Be Ordered

Under the **Provincial Offences Act**, particulars can be ordered either before or during the trial.

Provincial Offences Act: Section 36

Under the **Criminal Code**, prior to 1978, it was clear that particulars could not be ordered until the time for entry of a plea before the Judge who would be hearing the trial. Therefore, they could not be ordered at a preliminary inquiry.

Rex v. Haney et al. (1924), 43 C.C.C. 297 (Ont. S.C.)

Regina v. Chew, [1968] 2 C.C.C. 127 (Ont.C.A.)

More recently, it has been held that any Judge of the court in which the indictment has been filed has the authority to order particulars supplied.

Regina v. Pope et al. (1979), 45 C.C.C. (2d) 348 (B.C.Co.Ct.)

Re Cole and The Queen (1983), 70 C.C.C. (2d) 460 (Ont.H.C.)

Purpose of Particulars

When particulars are requested, they should not be provided if the only purpose is to limit the prosecution's possible bases of liability alleged against a defendant. For example, an accused may wish to have the prosecution specify under which of several enumerated definitions he will be proceeding. Such an order is in reality an attempt to fetter the prosecution.

"Counsel for the accused at the opening of the trial moved for particulars of the indictment.

Defence counsel for Govedarov at the trial, in making the application for particulars, stated that the Crown relied on s. 213 of the **Criminal Code** and he wished to know which of the offences enumerated in s. 213 of the **Criminal Code** the Crown was relying upon as being applicable to the charge. Crown counsel after some discussion said:

"... It is the burglary part of Section 213 that I rely on, as opposed to resisting lawful arrest, rape, indecent assault and so on."

The indictment had been preceded by a preliminary hearing lasting several days. Clearly, the purpose of the application for particulars was not to require the prosecution to provide the accused with additional details with respect to matters referred to in the indictment in order that the accused might be more fully informed of the act or omission charged against them, but was to restrict the prosecution to reliance on a part only of the definition of murder contained in the **Criminal Code**.

It is contended that Crown counsel, having stated in response to the application for particulars that he was relying upon the application of s. 213 to the offence of burglary, the Crown was precluded from relying upon the application of that section to the offence of robbery. I agree that particulars furnished orally are binding upon the Crown: **Cox v. The Queen; Paton v. The Queen; Regina v. Cox and Paton**, [1963] S.C.R. 500 at 511, 40 C.R. 52, [1963] 2 C.C.C. 148. I am also of the opinion, however, that the proposition which was asserted before us is based upon a misconception of the purpose of particulars.

In **Rex v. Buck**, 41 O.W.N. 31, 57 C.C.C. 290, [1932] 3 D.L.R. 97, Mulock C.J.O., delivering the judgment of the Ontario Court of Appeal, said at p. 293:

“The true function of particulars is to give further information to the accused of that which is intended to prove against him, so that he may have a fair trial.”

In **Regina v. Esdaile; Regina v. Brown; Regina v. Stapleton** (1857), 8 Cox C.C. 69 at 72, the principle governing the granting of particulars was stated by Coleridge J. as follows:

“The general principle applies only to this extent, to give such information as is sufficient to enable the defendant fairly to defend himself when in court; but, on the other hand, not to fetter the prosecutor in the conduct of his case.” In **Rex v. Buck**, Mulock C.J.O. said at p. 293:

“In thus framing the indictment it is sufficient to charge the offence in the language of the statute and this has, I think, been done. That which is charged against the accused is being a member of an unlawful association, to wit, the Communist Party. That is sufficient. What constitutes the Communist Party an unlawful association need not be set out. The **Code** itself constitutes the dictionary and by reference to it that which is essential to make an association an unlawful association can be ascertained. The interpreting and defining clauses of the **Code** are to be read into the indictment.” (The italics are mine.)

In **Rex v. Lukich**, 2 C.R. 73, [1946] 2 W.W.R. 508, 87 C.C.C. 83 (Alta.C.A.), the accused was charged with keeping a common gaming house. On the application of the accused the Justices had directed Crown counsel to specify the particular kind of gaming house encompassed by the definition of a common gaming house in s. 226 (now s. 179) of the **Code** to which the charge related. Harvey C.J.A., delivering the judgment of the Appellate Division of the Alberta Supreme Court, said at p. 85:

“It seems clear that the Justices were in error in compelling the prosecutor to charge the offence, by particulars or otherwise, under some one of the different definitions of s. 226.”

The accused in the instant case were charged with murder. The Crown was entitled to rely upon any part or parts of the definition of murder which were applicable to the facts which it was open to the jury to find were proved. The statement of Crown

counsel that he relied on the provisions of s. 213 with respect to burglary was, at most, merely an announcement of the theory upon which he intended to proceed and did not constitute the furnishing of particulars having the effect of limiting the charge contained in the indictment. Moreover, it does not appear that the accused were in any relevant sense misled or prejudiced by the enlargement of that theory to include the offence of robbery if there was evidence to support the application of ss. 213 and 21(2) to that offence. The contention that the indictment was void for duplicity if it charged that the offence of murder was committed in furtherance of burglary or robbery is, of course, entirely without merit.”

Regina v. Govedarov et al. (1974), 25 C.R.N.S. 1 at 36 and 37, per Mr. Justice Martin (Ont.C.A.); affirmed 32 C.R.N.S. 54 (S.C.C.)

Another purpose of particulars, especially in an offence such as a widespread complicated conspiracy, is to assist the trial Judge in properly ruling on the admissibility of evidence and in instructing a jury as to the applicable law.

Rex v. Imperial Tobacco Co. et al. (1940), 73 C.C.C. 18 at 31, (Alta.S.C.)

Regina v. Canadian General Electric Co. Ltd. et al. (No. 1) (1974), 17 C.C.C. (2d) 433 (Ont.H.C.J.)

Crown Unable to Supply Details

When Crown counsel does not have the specific information sought by a defendant, particulars will not be ordered nor will a pretrial examination of Crown witnesses be held to determine if they might possess the information.

Re Cole and The Queen (1983), 70 C.C.C. (2d) 460 (Ont.H.C.J.)

Regina v. Borden (1981), 61 C.C.C. (2d) 122 (Ont.H.C.J.)

Opening Address Not Particulars

Crown counsel's opening address to a jury assists the jury by acquainting the jury with the theory of the Crown and expected evidence. It also indicates to the trial Judge the legal issues which may arise. It does not constitute particulars which must be proved in the trial.

Regina v. Bengert et al. (No. 5) (1980), 53 C.C.C. (2d) 481 (B.C.C.A.) appeal to S.C.C. refused.

Demand for Evidence

The request for the particulars must not be in reality a demand for the evidence, i.e., can give particulars as to material facts in issue but not how those facts are to be proved.

F: Accused charged that he did “between the fifth day of January, 1956 and the fifth day of February, 1956, at Calgary, keep a common betting house situated in the premises at 309 8th Avenue East contrary to Section 176(1) of the **Criminal Code**. Accused asked for particulars. Magistrate refused and held “I am unable to order particulars in accordance with this application here, couched in the general words that are set out whether the place was kept to enable, encourage or assist persons to bet between themselves, and if so what persons made such bets, and the dates that such bets were made. In the first place, the dates of such offences are set out in the information. What persons, if any made bets, this is a matter of evidence. Crown Counsel is not obliged to furnish the names of witnesses nor is it obliged to set out . . . the evidence that it expects to adduce at the trial.”

H: Mandamus would not lie to force Magistrate to exercise his discretion differently.

Ault v. Read (1956), 115 C.C.C. 132 (Alta.C.A.)

Effect of Particulars

The general rule is that the prosecutor is bound by the particulars furnished whether it be by order of a court or voluntarily. This however is subject to the rule that particulars provided must not fetter the prosecution. See **PURPOSE OF PARTICULARS**, *supra*.

Those particulars which only provide further information for a valid charge, are mere surplusage if they delineate descriptive details. See **SURPLUSAGE**, *infra*. It is not necessary to prove nonessential details.

Regina v. Van Hees (1958), 27 C.R. 14 (Ont.C.A.)

If the particulars relate to a material element of the charge, then they must be proved (or the charge amended to conform with the evidence).

Regina v. Austin (1955), 113 C.C.C. 95 (Ont.C.A.)

Regina v. Moroz (1972), 5 C.C.C. (2d) 277 (Alta.C.A.) appeal to S.C.C. dismissed at 9 C.C.C. (2d) 192

Regina v. Bollers (1980), 52 C.C.C. (2d) 62 (Ont.C.A.)

The fact that the particulars supplied may disclose another offence does not make the charge duplicitous nor otherwise void.

Rex v. McLeod (1941), 75 C.C.C. 305 (S.C.C.)

PARTIES TO AN OFFENCE

Introduction

All secondary offenders whether they be aiders, abettors, inciters, procurors or counsellors are charged as if they were principals who actually committed the offence(s).

Rex v. Halmo, [1941] O.R. 99 (Ont. C.A.)

Although aiding may involve more active participation than “abetting” which connotes a role as an instigator or one who encourages, in practice the courts group both concepts and treat them as almost synonymous. Either activity constitutes a person a party to the offence.

Regina v. Meston (1976), 28 C.C.C. (2d) 497 (Ont.C.A.)

Provincial Offences Act

See sections 77 and 78

Aiding and Abetting

1. A person who is simply present, i.e., a passive spectator, at the scene of a crime is not a party, even if he does nothing to prevent it.
Dunlop and Sylvester v. The Queen (1979), 47 C.C.C. (2d) 93 (S.C.C.)
2. A person's presence at the scene of a crime may in itself in certain circumstances be some evidence of aiding and abetting.
Preston v. The King (1949), 93 C.C.C. 81 (S.C.C.)
3. A person who is present at the scene of a crime with prior knowledge that a crime was to occur may be a party if he offered no opposition to the commission of the offence.
Dunlop and Sylvester v. The Queen (1979), 47 C.C.C. (2d) 93 (S.C.C.)
4. A person who is present and has the authority to prevent the commission of an offence by another may be guilty of aiding the offence if he omits to make any efforts to stop it.
Regina v. Kulbacki, [1966] 1 C.C.C. 167 (Man.C.A.)
5. A person who is present at the scene of a crime and who does more than simply watch, e.g., encourages the principal offender, or does an act which facilitates the commission of the offence such as keeping watch or enticing the victim to the scene, is guilty as a party.
Dunlop and Sylvester v. The Queen (1979), 47 C.C.C. (2d) 93 (S.C.C.)
6. A person who is present at the scene of a crime and who encourages the principals by laughing and yelling is guilty as a party.
Regina v. Black and six others, [1970] 4 C.C.C. 251 (B.C.C.A.)
7. A person who is present at the scene of a crime and whose presence ensures against the escape of the victim is guilty as a party.
Regina v. Black, supra.
8. A person may be an aider and abettor without active participation at the moment the crime is committed. His actions or omissions may precede the actual crime.
Rex v. Halmo, [1941] O.R. 99 (Ont.C.A.)
9. A person may be an aider and abettor if with the intention of giving assistance he is near

enough to provide it should the occasion arise.

Regina v. McLeod et al. (April 13, 1982), unreported (Ont.C.A.) Leave to appeal to Supreme Court of Canada refused Fall of 1983.

Abet Defined

The acts done or words uttered must be intended to encourage the principal offender to commit the offence. Abetting involves assistance for the purpose of aiding the principal.

Regina v. Curran (1977), 38 C.C.C. (2d) 151 (Alta.C.A.) application to S.C.C. dismissed 1978.

Counselling Defined

Counselling means to advise or recommend an illegal course of action. It is immaterial that the party counselled was not influenced by the communication. The counsellor and the recipient need not meet and discuss the matter face to face. Counselling may be done through a publication.

Regina v. McLeod et al. (1970), 12 C.R.N.S. 193 (B.C.C.A.)

Procure Defined

“To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no attempt at agreement or discussion as to the form which the offence should take.”

Attorney General's Reference (No. 1), [1975] Q.B. 773 at 779 (Eng. C.A.)

The offence of procuring is committed even though the person procured did not ever intend to commit the crime. It is not necessary to prove that the procurer persistently prevailed upon the other person. It is enough that the procurer and the other person ostensibly agreed that the other was to commit an offence, that is, the offer of the procurer was accepted by the procuree with a reward offered as consideration. There is no distinction between procuring an offence and procuring a person to commit an indictable offence.

Regina v. Glubisz (No. 2) (1979), 9 C.R. (3d) 300 (B.C.C.A.)

Common Intention/Purpose

Although the principal is not convicted of an offence, a secondary offender who formed a common intention to carry out an unlawful purpose and to assist the principal may be found guilty if the offence was a probable consequence of carrying out the common purpose.

Remillard v. The King (1921), 35 C.C.C. 227 (S.C.C.)

Zanini v. The Queen (1967), 2 C.R.N.S. 219 (S.C.C.)

The intermittent operation of an automobile by an impaired driver and passenger over a period of several hours is an unlawful purpose. Each assisted the other and when one of them causes death by criminally negligent driving, the other is liable as a party for such foreseeable consequences.

Regina v. Lachance (1962), 132 C.C.C. 202 (Man. C.A.)

The abandonment of a common intention must be clearly communicated to the other parties to be effective.

Rex v. Whitehorse (1940), 75 C.C.C. 65 (B.C.C.A.)

Henderson v. The King (1948), 91 C.C.C. 97 (S.C.C.)

Accused Tried Alone

Where the accused is being tried alone and there is evidence that more than one person was involved in the commission of the offence, the statutory provisions concerning parties to offences should be considered even though the identity of the other participant(s) is unknown and even though the precise part played by each participant may be uncertain.

Regina v. Sparrow (1979), 51 C.C.C. (2d) 443 (Ont.C.A.)

Regina v. Isaac (1984), 9 C.C.C. (3d) 289 (S.C.C.)

Secondary Offenders in Driving Offences

The following cases indicate the potential culpability of friends or passengers.

- F: A person surreptitiously laced a friend's drinks with double quantities of liquor knowing that his friend would soon be driving home.
- H: The person procured the commission of an offence by the friend who he knew was going to drive with more than the legal limit of blood alcohol.
Attorney General's Reference (No. 1), [1975] Q.B. 773 (Eng.C.A.)
- F: Accused owner of a car hired a chauffeur to drive him along with some friends from Windsor to London. En route the chauffeur and accused became intoxicated. While chauffeur was driving erratically with accused in backseat, the vehicle crossed centre line and collided with oncoming vehicle killing chauffeur, passenger and occupants of oncoming vehicle.
- H: Accused guilty of reckless driving in that he aided and abetted the chauffeur by not preventing the reckless, dangerous, and intoxicated driving.
Rex v. Halmo, [1941] O.R. 99 (Ont.C.A.) See other examples cited therein.
- F: An owner of a car sat in the seat beside the driver who was exceeding the speed limit.
- H: The owner was guilty as an aider and abettor because he failed to make any effort to stop the offence when he had the authority to do so.
Regina v. Kulbacki, [1966] 1 C.C.C. 167 (Man.C.A.)
- F: Accused who was in effect the owner of the car allowed his friend to drive it. Both were intoxicated and the car was involved in accident. Was not clear whether accused or friend was actually driving at time of accident.
- H: Accused aided and abetted his friend who was likely driving at material time. Accused should not have allowed his friend to drive if impaired. Operation of the vehicle for a period of several hours by both parties while they were intoxicated constituted a common unlawful purpose in which each assisted the other and the resulting fatal accident was a probable, if not inevitable, consequence of carrying out such common purpose.
Regina v. Lachance (1962), 132 C.C.C. 202 (Man.C.A.)

PHOTOGRAPHS

Introduction

The admissibility of photographs is not governed by statute and therefore reference must be made to the case law.

A photograph, like a map or diagram, is a witness' pictured expression of the data observed by him and therein communicated to the tribunal more accurately than by words or it may be used as a so-called silent witness. Its use for this purpose is sanctioned beyond question.

Wigmore on Evidence, 3rd ed., volume 3, paragraph 792, p. 178

Early decisions indicated that photographs were only to be admitted as illustrative of verbal testimony however more recent cases indicate that the photographs per se are real evidence which speak for themselves. This latter approach obviates the need for verification.

Discretion

The admissibility issue is a decision in which the trial Judge must exercise his own carefully considered discretion.

Draper v. Jacklyn (1970), 9 D.L.R. (3d) 264 (S.C.C.)

Regina v. Emkeit and 12 Others (1971), 3 C.C.C. (2d) 309 at 328, 14 C.R.N.S. 290 (Alta. C.A.)

Regina v. Wildman (1981), 60 C.C.C. (2d) 289 (Ont. C.A.)

This discretion is not unqualified so as to allow a trial Judge to reject what would otherwise be admissible.

Criteria for Admissibility

1. Photographs are material and relevant to issues.
2. Photos accurately represent the facts.
3. Photos are not misleading.
4. Photos are verified on oath by a person capable of doing so.
Regina v. Creemer and Cormier (1967), 1 C.R.N.S. 146 (N.S.C.A.)
5. The photographs will be used to support and explain the oral evidence.
Regina v. Sim (1954), 108 C.C.C. 380 (Alta. S.C.)
Regina v. Conkie (1978), 39 C.C.C. (2d) 408 (Alta. C.A.)
6. If verbal descriptive evidence could be related, then similar photographic evidence is admissible.
Green v. The King (1939), 61 C.L.R. 167 (H.C. of Australia) approved in Draper v. Jacklyn et al. (1969), 9 D.L.R. (3d) 264 (S.C.C.) See also Draper v. Jacklyn et al. (1969), 9 D.L.R. (3d) 264 (S.C.C.).
7. A photograph of trivial or no probative value which is substantially prejudicial may not be admitted if to do so would preclude a fair and impartial trial.
Regina v. Sim (1954), 68 C.C.C. 380 (Alta. S.C.)
Regina v. Green (1972), 9 C.C.C. (2d) 289 (N.S.C.A.)

Regina v. Davis (No. 2) (1977), 35 C.C.C. 464 (Alta. C.A.)

8. However, if the probative value outweighs prejudicial effect they should be admitted.
Draper v. Jacklyn (1969), 9 D.L.R. (3d) 264 (S.C.C.)
Regina v. Salmon (1972), 10 C.C.C. (2d) 184 (Ont. C.A.)
Regina v. Wildman (1981), 60 C.C.C. (2d) 289 (Ont. C.A.)
9. Photographs, if otherwise admissible, may only be disallowed if they are gravely prejudicial to the accused, their admissibility is tenuous and their probative force in relation to the main issue before the court is trifling.
The Queen v. Wray (1970), 11 D.L.R. (3d) 673 (S.C.C.)

Purposes for Admitting Photographs

1. To provide evidence whereby an expert arrived at his opinion.
Regina v. MacDonald (1952), No. 6709 unreported (P.E.I.S.C.) referred to in *Regina v. Gallant* (1965), 47 C.R. 309 (P.E.I.S.C.)
2. To show minute details not otherwise visible to the naked eye.
Regina v. MacDonald *supra*
3. To bring forth facts more clearly than is possible by oral description.
The King v. Cartman, [1940] N.Z.L.R. 725 (N.Z.S.C.)
4. To explain and support the verbal evidence.
Regina v. Sim (1954), 108 C.C.C. 380 (Alta. S.C.)
Rex v. O'Donnell (1936), 65 C.C.C. 299 (Ont. C.A.)
Regina v. Green (1972), 9 C.C.C. (2d) 289 (N.S.C.A.)
Draper v. Jacklyn (1969), 9 D.L.R. (3d) 264 (S.C.C.)
5. As part of the testimony of the physician under whose care the victim was diagnosed and treated.
Rex v. Ashe (1922), 39 C.C.C. 193 (N.B.C.A.)
6. To assist in determining accused's intent, e.g., to be inferred from scene and injuries.
Regina v. Davis (No. 2) (1977), 35 C.C.C. (2d) 464 (Alta. C.A.)
7. To show a link between a weapon and injuries inflicted, i.e., to show a cause and effect relationship.
Regina v. Wildman (1981), 60 C.C.C. (2d) 289 (Ont. C.A.)
8. To assist in understanding issues and theories raised by the prosecution or the defence.
Regina v. Salmon (1972), 10 C.C.C. (2d) 184 (Ont. C.A.)

Examples of Photographs Admitted

1. X-rays of a ten year old girl's broken arm — she being the abused daughter of the accused.
Rex v. Ashe (1922), 39 C.C.C. 193 (N.B.C.A.)
2. Photographs of deceased woman, lying on her back in a ravine, nude from below breasts, with a tightened sweater around her neck, with smears of blood on body and injuries to

head.

Rex v. O'Donnell (1936), 65 C.C.C. 299 (Ont. C.A.)

3. Photographs of the charred remains of a murder victim as they appeared at the time of the post mortem examination.
Rex v. Bannister (1936), 66 C.C.C. 38 (N.B.C.A.)
4. Photographs of murdered women lying in rooms as they were found.
Green v. The King (1939), 61 C.L.R. 167 (H.C. of Australia) approved in Draper v. Jacklyn et al. (1969), 9 D.L.R. (3d) 264 (S.C.C.)
5. Photographs of a murdered woman found in gruesome circumstances.
The King v. Cartman, [1940] N.Z.L.R. 725 (N.Z.S.C.) approved in Draper v. Jacklyn et al. (1969), 9 D.L.R. (3d) 264 (S.C.C.)
6. Photographs of a deceased woman both at scene and at funeral home later.
Regina v. Sim (1954), 108 C.C.C. 380 (Alta. S.C.)
7. Colour photographs of a rape victim.
Regina v. Creemer and Cormier (1967), 1 C.R.N.S. 146 (N.S.C.A.)
8. Photographs of a deceased biker showing head injuries that he had suffered.
Regina v. Emkeit and 12 Others (1971), 3 C.C.C. (2d) 309, 14 C.R.N.S. 290 (Alta. C.A.)
9. Photographs of accident victim's face showing scars and pins in jaw which protruded from his face during facial reconstruction.
Draper v. Jacklyn et al. (1969), 9 D.L.R. (3d) 264 (S.C.C.)
10. Colour and black and white photographs showing the bruises, bloodied body and lacerations of murder victim.
Regina v. Green (1972), 9 C.C.C. (2d) 289 (N.S.C.A.)
11. Coloured photographs of deceased at scene and at autopsy and of scene itself. Photos depicted approximately twenty stab wounds inflicted on deceased.
Regina v. Davis (No. 2) (1977), 35 C.C.C. (2d) 464 (Alta. C.A.)
12. Photographs of a six year old girl who was stabbed thirty to thirty-three times in the chest and abdomen.
Regina v. Conkie (1978), 39 C.C.C. (2d) 408 (Alta. C.A.)
13. Photographs of elderly rape victim showing bruising and lacerations although photographs were darker than actual injuries due to malfunction of flash.
Regina v. Taylor (1979), 48 C.C.C. (2d) 523 (Nfld. C.A.)
14. Photographs of the head of an eight year old girl murdered by hatchet blows to the head.
Regina v. Wildman (1981), 60 C.C.C. (2d) 289 (Ont. C.A.)

Examples of Photographs not to be Admitted

- F: On a murder trial in which the defences of accident self-defence, provocation and drunkenness were raised, the trial Judge directed a witness to show all of the blood-stained

garments of the deceased and admitted photographs of the deceased. No issue was depicted nor explained by the clothing and the photographs.

H: In this instance the photographs and clothing were inflammatory only with no probative value.

Regina v. Dilabbio, [1965] 4 C.C.C. 295 (Ont. C.A.)

F: Photographs of deceased where body found and at the time of autopsy.

H: The photographs were not required nor helpful because they did not provide basis for expert opinions, did not show minute details, did not corroborate any oral testimony and were possibly misleading.

Regina v. Gallant (1965), 47 C.R. 309 (P.E.I.S.C.)

Note: This case is not in accord with more recent decisions and is probably not the law in Ontario today.

Inflaming Jury

This issue can only arise in a jury trial whereby there may be a concern that a layman's revulsion may be so aroused by the gruesomeness of the photographs that he will thereby react prejudicially to the accused. Before a Judge or Justice of the Peace this issue cannot arise because he must react judicially.

This consideration cannot interfere with the admissibility of photographs which is to be determined according to the ordinary rules of evidence.

Rex v. O'Donnell (1936), 65 C.C.C. 299 (Ont. C.A.)

Regina v. Sim (1954), 108 C.C.C. 380 (Alta. S.C.)

Even if photographs are inflammatory, if their probative value outweighs their prejudicial effect, they should be admitted.

"In the first place, a submission was made as to the admission by the learned trial Judge of a series of pictures of the body of the deceased woman, it being contended that such pictures had little probative value and were calculated to prejudice unduly a fair trial of the accused by inflaming the minds of the jurors. We see no merit in this ground whatever as it appears to us that because of the issues presented to the jury, the pictures were not only relevant to these issues but were of great significance. The theory of the defence was that the fatal injuries to the deceased resulted from a number of falls by the deceased woman, and that they were not inflicted by the appellant, as was alleged by the Crown. There was medical evidence introduced which indicated the injuries were caused by heavy blows to the head and body of the deceased, and the doctor who testified stated there was slight possibility the injuries resulted from the alleged falls by the deceased. In our opinion, the photographs were very helpful to the jury, who were required to bring their practical knowledge and experience to bear on the question of whether the types of injuries described to and illustrated for them might have been caused in the manner suggested by the accused. It was essential for them to appreciate fully the nature and extent of the injuries in order to decide whether they might have resulted from falls in a bathroom, or down a flight of cement stairs. Having seen those photographs, we feel they must have assisted the jury in relating the evidence to the theories of both the Crown and the defence, and enabled them to reach a sensible and just result."

Regina v. Salmon (1972), 10 C.C.C. (2d) 184 at 185 (Ont. C.A.)

Also *Regina v. Wildman* (1981), 60 C.C.C. (2d) 289 (Ont. C.A.)

Also *Draper v. Jacklyn* (1969), 9 D.L.R. (3d) 264 (S.C.C.)

Verification of Photographs

Photographs properly verified on oath by a person able to speak to their accuracy are admissible.

Regina v. Tolson (1864), 176 E.R. 488

Regina v. Creemer and Cormier (1967), 1 C.R.N.S. 146 (N.S.C.A.)

Unless some issue as to the accuracy of the photographs is raised, it is not necessary to call the photographer. A witness who testifies that the photographs accurately depict whatever they portray can verify them and “it seems immaterial to enquire as to the person who had taken them or when they were taken or as to those engaged in their development.”

Rex v. Bannister (1936), 66 C.C.C. 38 (N.B.C.A.) per Baxter C.J. at 41

F: Witness who took photographs found in hotel room of accused unsure if she took them as she was under the influence of a drug.

H: Photographs admissible even in absence of verification by photographer.

Regina v. Davis, [1970] 3 C.C.C. 260 (Alta. C.A.)

A film record of radar echoes recorded mechanically from a shore radar station was admissible although no human verification was available.

Owners of Motorship Sapporo Maru v. Owners of Steam Tanker Statue of Liberty, [1968] 2 All E.R. 195

Colour Photographs as opposed to Black and White

The accurate portrayal of injuries and scenes suggests the advantages of colour photographs. Black and white films are not as suitable because they are primarily blue-sensitive; that is why prints of blue skies are usually lighter than they actually appear. If a bruise is dark blue, it will become too light. If a bruise is red, it will appear too dark. Also when enlarging black and white negatives, the bruises may be printed either too light or too dark.

“[The colour photographs were] certainly more vivid than the black and white photographs . . . and . . . also more natural but to produce these four is in order to give a clear indication to the Jury of the scene that’s to be considered by them, and, in my opinion, there is nothing about the coloured photographs which would in any way mislead the Jury or be unduly inflammatory.”

Regina v. Green (1972), 9 C.C.C. (2d) 289 at 299 (N.S.C.A.); reaffirming its previous holding in Regina v. Creemer and Cormier (1967), 1 C.R.N.S. 146 (N.S.C.A.)

Motion Pictures and Videotapes

For an excellent review of the admissibility of videotapes see “Motion Picture and Videotape Evidence, Documentary and Demonstrative Evidence,” Federation of Law Societies in Canada, Toronto, July, 1978 by John D. Scott, Q.C.

Generally the same principles apply as with the admissibility of photographs. The film/tapes must be true and accurate reproductions of the events recorded and be of assistance in resolving the issues.

Regina v. Maloney (No. 2) (1976), 29 C.C.C. (2d) 431 (Ont. Co. Ct.)

Motion pictures were admitted to clarify the verbal testimony.

Army and Navy Dept. Store v. Retail Wholesale and Dept. Store Union et al. (1950), 97 C.C.C. 258 (B.C.S.C.)

Motion pictures were admitted to contradict evidence of the plaintiff.

Chayne v. Schwartz, [1954] S.C. 123 (Que. S.C.)

A videotape of a burlesque dance was admitted only in so far as it agreed with witnesses who viewed the dance on an earlier occasion.

Regina v. Murphy (1972), 8 C.C.C. (2d) 313 (Ont. Prov. Ct.)

A videotape of an incident at a hockey game was admissible if shown at actual speed.

Regina v. Williams (1977), 35 C.C.C. (2d) 103 (Ont. Co. Ct.)

A videotape was made of a specific area in a building in which damage had repeatedly occurred. The recording camera was activated by a motion detector unattended by any human agent.

Regina v. Taylor (June 8, 1983), unreported (Ont. Prov. Ct.)

Photos Found in Possession of Accused

Photographs found in possession of accused are prima facie admissible and it is unnecessary to prove verification by photographer.

Regina v. Lambert, [1967] Crim. L.R. 480 (Eng. Ct. of Crim. App.)

Regina v. Davis, [1970] 3 C.C.C. 260 (Alta. C.A.)

REASONABLE DOUBT

Introduction

English decisions have frequently advised against explaining the term “reasonable doubt” as it only renders uncertain an expression which is ordinarily well understood. See for example:

Regina v. Summers (1952), 36 Cr. App. R. 14 per Lord Goddard, C.J. (Eng. Court of Criminal Appeals) and Regina v. Hepworth and Fearnley, [1955] 2 Q.B. 600 (Eng. Court of Criminal Appeals)

Many Canadian cases, however, express the opposite view. See for example:

Regina v. Lachance, [1963] 2 C.C.C. 14 (Ont. C.A.)

Clark v. Rex (1921), 61 S.C.R. 608 (S.C.C.)

Delisle v. Rex (1929), 51 C.C.C. 253 (Que. K.B.)

Latour v. R., [1951] S.C.R. 19 (S.C.C.)

Boucher v. The Queen (1956), 24 C.R. 291 (S.C.C.)

Rex v. Labine (1937), 69 C.C.C. 151 (Alta. C.A.)

Rex v. Sears (1947), 90 C.C.C. 159 (Ont. C.A.)

The words “reasonable doubt” are usually included in the phrase “beyond a reasonable doubt”, which describes the onus of proof on the prosecution. Beyond a reasonable doubt does not mean that the Crown must go to the ends of the earth to prove guilt. “Beyond” means “to the exclusion of” a reasonable doubt and if the court does not have such doubt, it ought to convict.

Defined

“I will now deal with the question of the onus or burden of proof. The onus or burden of proving the guilt of an accused person beyond a reasonable doubt rests upon the Crown and never shifts. There is no burden on an accused to prove his innocence. The Crown must prove beyond a reasonable doubt that an accused person is guilty of the offence with which he is charged, before he can be convicted. If you have a reasonable doubt as to whether the accused committed the offence with which he is charged, it is your duty to give the accused the benefit of the doubt and to find him not guilty.

In other words, if after considering all the evidence, the arguments of counsel and my charge, you come to the conclusion that the Crown has failed to prove to your satisfaction beyond a reasonable doubt that the accused committed the offence with which he is charged, it is your duty to give the accused the benefit of the doubt and to find him not guilty.

A question that may come to your minds is, what is meant by the words “reasonable doubt”. A reasonable doubt is “an honest doubt”, “a real doubt”, not “an imaginary doubt” conjured up by a juror to escape his responsibility. It must be a doubt which prevents a juror from saying “I am morally certain that the accused committed the offence with which he is charged”. Kennedy, Aids to Jury Charges Criminal (1965), 21

Evidence To Be Considered in Total and Cumulatively

It is a misdirection for trial Judge (even when sitting alone) to fail to mention a large part of the incriminating evidence, to relate it to the rest and to fail to instruct jury that all evidence must be considered together in deciding proof beyond reasonable doubt; the facts are to be considered cumulatively and not in isolation.

Stewart v. The Queen (1976), 31 C.C.C. (2d) 497 (S.C.C.)

The standard of proof beyond a reasonable doubt does not apply to the individual pieces of evidence or the separate pieces of evidence which make up the Crown's case, but to the total body of evidence upon which the Crown relies to prove guilt. This applies where a case depends upon direct or circumstantial evidence or both. It is a serious misdirection to instruct the jury that they must be satisfied beyond a reasonable doubt with respect to each of the separate pieces of evidence which the Crown relies upon to prove guilt.

Regina v. Gaetan Bouvier (February 3, 1984), unreported (Ont.C.A.)

Doubt Not To Be Based on Speculation, Only on Actual Evidence

“Where a *prima facie* case of murder is established by proof to the satisfaction of the jury of facts which without explanation constitute a case of culpable homicide . . . the jury cannot properly acquit the prisoner upon some imaginary state of facts, the existence of which has no warrant in the evidence, and unless such warrant appears from the evidence adduced by the Crown or from the circumstances admitted, then it is for the prisoner to adduce evidence affording a foundation for the defence.”

Picariello et al. v. The King (1937), 39 C.C.C. 229 (S.C.C. per Duff J. at 237)

“The doubts must be based on the evidence, not on mere speculation. “If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence — of course it is possible but not in the least probable — the case is proved beyond a reasonable doubt, but nothing short of that will suffice”.”

Miller v. Min. of Pensions, [1937] 2 All E.R. 1059 per Lord Denning at 373-374.

“‘The rule (in **Hodge’s Case**) makes it clear that the case is to be decided on the facts, that is, the facts proved in evidence, and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion, would be a speculative, imaginative conclusion, not a rational one.’ ”

Regina v. McIver, [1965] 1 C.C.C. 210 at 214 (Ont.H.C.J.); approved at [1965] 4 C.C.C. 182 (Ont.C.A.) and at [1966] 2 C.C.C. 289 (S.C.C.)

“I recognize that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this proposition to mean that the Crown must negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.”

Regina v. Torrie, [1967] 3 C.C.C. 303 (Ont.C.A.) which statement was adopted by S.C.C. in *Wild v. The Queen*, [1970] 4 C.C.C. 40, and by S.C.C. in *Regina v. Bagshaw* (1971), 4 C.C.C. (2d) 303

“The jury cannot be asked to consider a speculative issue and to reach a conclusion thereon when there is no evidence before it on the issue. Nor can the Crown be expected to negative as part of its case every speculation which may be conjured up in the mind of defence counsel at the close of the evidence. . .

In the face of these invitations to speculate from defence counsel, the trial Judge ought to have instructed the jury to disregard these statements and other insinuations on facts or motives not founded on evidence, and to decide the issue of the guilt or innocence of the accused only on the evidence before it.”

Regina v. Timm (1980), 52 C.C.C. (2d) 65 at 78 and 79 (Alta.C.A.)

Beyond Any Peradventure of Doubt or Beyond Any Shadow of a Doubt

The use of these terms by a trial Judge (sitting alone or in a charge to a jury) constitutes a serious misdirection as it imposes a much stricter standard than required.

Stewart v. The Queen (1976), 31 C.C.C. (2d) 497 (S.C.C.)

A Doubt Which Can Be Explained and Expressed

“This business of reasonable doubt . . . it is plain English, there is no special legal meaning to it, it is the kind of doubt we harbour in ordinary life about many things about which we can’t be reasonably sure. It is a real, honest and sensible doubt . . . a reasonable doubt is one which we can express and explain. It must be based on the evidence, or lack of evidence, given before you and not on rumour or settled views or biases and prejudices which we may entertain or must not be something that is conjured up by an irresponsible juror.”

Regina v. Baker (1974) extract from charge to the jury by Mr. Justice Peter Wright given in London to Supreme Court in January, 1974.

Not an Imaginary or Possible Doubt

Reasonable doubt as to an accused’s guilt means doubt which is real as distinguished from illusory, doubt which an honest juror has after considering all the evidence so that he is unable to say “I am morally certain of his guilt”. Moral certainty does not mean, however, absolute or demonstrable certainty . . . it is a doubt which is not illusory or fanciful or a mere figment of the imagination.

Rex v. Sears (1947), 90 C.C.C. 159 at 163, 164, (Ont.C.A.)

F: Trial Judge had instructed jury on murder trial that they must have doubts based on “probabilities” not “possibilities”.

H: New trial ordered because charge constituted misdirection. Jury can consider reasonably possible or natural things and probable causes. (However, pure possibilities are not to be considered.)

Regina v. Lachance, [1963] 2 C.C.C. 14 (Ont.C.A.)

Regina v. Campbell (1977), 17 O.R. (2d) 673 (Ont.C.A.)

“It is quite clear to me that the circumstance that a defence story sets out something that is possible gives no basis for doubt of the case advanced by the Crown. A story that is not possible requires no further thought. To merit consideration there must indeed be possibility, but in addition there must be some reasonable probability. On the strength of the probability depends whether and how far it can give rise to a reasonable doubt. The probability may depend, in part at least, on the credibility of the witness or witnesses . . . Nothing can flow from possibility alone.”

Rex v. Malanik (1951), 100 C.C.C. 28 (Man.C.A.) per *Coyne, J.A.* at 45 dissenting on other grounds

“Testimony that an act may possibly be done in a certain way under certain conditions is purely fanciful or speculative unless it is founded on some objective evidence (as distinguished from subjective reasoning), which points to a reasonable likelihood it was done in that way. Since legal proof is relative, objective evidence is not inconclusive merely because it may leave room for subjective doubt. In my judgment . . . a doubt is not reasonable, and a hypothesis is not rational, unless it is supported by testimony which when viewed objectively in the particular circumstances, presents an explanation which arises reasonably, necessarily or probably from the facts proved wrong”.

Rex v. Campbell (1946), 88 C.C.C. 41 (B.C.C.A. per *O’Halloran J.A.* at 47 relying on and quoting *Picariello*

et al. v. The King (1923), 39 C.C.C. 229 at 237 per Duff J. and Rex v. McQuarrie (1944), 81 C.C.C. 20 per MacKenzie J.A. at 24 (Sask. C.A.)

When Arises

Reasonable doubt arises only when both sides have completed their case — not at the close of the Crown's case unless accused has elected not to give any evidence and has so declared.

Regina v. Matioli (1953), 17 C.R. 138 (Que.Q.B.Appeal)

Rex v. Morabito (1949), 93 C.C.C. 25 (S.C.C.)

RE-EXAMINATION

Introduction

Re-examination of a party's own witness must be confined to matters arising out of the cross-examination of that witness.

Wigmore, Evidence, vol. 6, s. 1896

Phipson, Evidence, Footnote 1, at 671

Cross, Evidence (3rd ed.) pp. 222, 223

Re-examination may also rehabilitate a party's own witness by correcting erroneous impressions, contradictions or inferences or explaining biases brought out on cross-examination.

Wigmore, Evidence, vol. 6, at p. 740

Regina v. Deshaies et al., [1966] 3 C.C.C. 176 (Que.Q.B.)

Regina v. Sigmund et al., [1968] 1 C.C.C. 92 (B.C.C.A.)

Previous consistent statements may be introduced to rebut cross-examination which suggested that the witness recently concocted his evidence.

Regina v. Campbell (1977), 17 O.R. (2d) 673 (Ont.C.A.)

Also previous consistent statements may be introduced to show that a witness may have omitted certain testimony due to forgetfulness.

Regina v. Kozodoy (1957), 117 C.C.C. 315 (Ont.C.A.)

New Matters

Re-examination is an explanatory and clarifying step. It cannot be used to simply supplement a party's case. Any new or fresh matter, not dealt with in examination-in-chief or cross-examination can only be introduced with leave of the Judge.

Cross, Evidence (3rd ed.) pp. 222, 223.

Leading Questions

Leading questions are not allowed except to direct the mind of the witness to the part of the cross-examination that counsel is seeking to have explained.

Cross, *supra*, p. 222.

Admittance of Prejudicial Information

The terms of the cross-examination may let significant and prejudicial evidence in through re-examination although such evidence would not be admissible-in-chief. For example, a police officer has been cross-examined with insinuations made to the effect that he is an agent provocateur. This witness may then be asked on re-examination about his reasons for approaching the accused, and the court may thus be provided with information about suspicions entertained by the police concerning the accused.

Cross, Evidence (3rd ed.) p. 223.

REFRESHING MEMORY

Introduction

Any witness, whether he be an expert, a layman or a police officer, may better testify if he refreshes his memory before or with permission of the Judge during the giving of his evidence. He may use notes for that purpose however simply reading from notes verbatim is not appropriate unless it is a technical detail which it would be unreasonable to expect had been committed to memory. Alterations or corrections of notes referred to may affect weight but not necessarily.

“The law [on refreshing one’s memory from notes] is, I consider, correctly laid down in Phipson on Evidence, fifth ed., p. 466 as follows:

‘A witness may refresh his memory by reference to any writing made or verified by himself concerning and contemporaneously with the facts to which he testifies . . . The writing may have been made either by himself, or by others, providing in the latter case that it was read by him when the facts were fresh in his memory, and he knew the statement to be correct . . . it is not essential that the witness should have any independent recollection of the facts. Thus, an attesting witness, from seeing his own signature to a deed, may say that he is sure that the party has executed it . . . so a barrister may refer to notes on his brief, although he has no recollection of the case . . . or an agent who has made a memorandum of the term of a lease, but forgotten the transaction, may swear from seeing the memorandum he has no doubt the lease was granted . . . and a journalist may refer to the copy of an article written by him, although he has forgotten the facts narrated . . . ’”

Fleming v. Toronto Railway Co. (1912), 25 O.L.R. 317 (Ont. C.A.) per MacLaren, J. A. at 322, 323.

“Present Memory Refreshed” and “Past Recollection Recorded”

Documents may be used by witnesses in two ways. By referring to notes or other things, the memory of the witness is revived so that he can recall the forgotten facts. He then testifies from his memory in the same manner as a witness without notes. This procedure — present memory refreshed — simply prompts the witness’ own memory. The notes or document should not be entered into evidence although opposing counsel may inspect them and use them for cross-examination of the witness.

In other cases, a witness may, even after referring to notes, be unable to recall the event recorded therein. If certain conditions are met, the note or document itself can be entered as substantive evidence in itself. This process — past recollection recorded — also allows for inspection by opposing counsel.

The preconditions are:

1. The witness must have no present recollection of the event recorded.
2. The witness had firsthand knowledge of the event recorded.
3. The document must be the original written record. Alterations or corrections affect weight, not admissibility.
4. The record was made by the witness at or near the time of the event recorded and then verified by him.
5. The witness must swear to the accuracy and truth of the record at the time it was made

e.g., I would not sign any document unless I was certain it was true and I recognize my signature.

Phipson, *Evidence* (12th ed.) p. 645

Re Regina v. Coffin (1956), 114 C.C.C. 1 (S.C.C.)

Regina v. Bengert et al. (1981), 15 C.R. (3d) 114 at 160-163 (B.C.C.A.)

Regina v. Alward (1977), 32 C.C.C. (2d) 416 (N.B.C.A.)

Regina v. Rouse and McInroy (1977), 36 C.C.C. (2d) 257 (B.C.C.A.) affirmed on different grounds by S.C.C. (1978), 42 C.C.C. (2d) 481

Salutin v. Regina (1980), 11 C.R. (3d) 284 (Ont.C.A.)

Examples of Past Recollection Recorded:

1. A report signed by the witness who was a foreman which showed that he had made an earlier inspection should have been admitted although the witness could not remember the actual inspection.
Fleming v. Toronto Rlwy. Co. (1911), 25 O.L.R. 317 (Ont.C.A.)
2. A witness made a lengthy statement to the police shortly after the event. At trial the witness claimed that she could not remember the contents of the statement. However, she admitted making the statement and that in it she was telling what she believed to be the truth at the time. This statement was admissible as truth of the facts contained therein, that is, the contents of the statement were substantive evidence per se and could be considered by jury.
Regina v. Rouse and McInroy (1977), 36 C.C.C. (2d) 257 (B.C.C.A.) upheld on other grounds by S.C.C. (1978), 42 C.C.C. (2d) 481
3. Memoranda (here, a record of a serial number of a watch) made contemporaneously with the event recorded and verified as being true at the time it was made by a witness who now had no present recollection of the facts contained therein, constitutes past recollection recorded and must be produced at trial. This is contrasted to memoranda used merely to refresh a present memory of a previous event, which may be looked at by the witness but not admitted into evidence. Both types of memoranda may be the subject of cross-examination. However, where a trial judge wrongly refuses to admit a document containing past recollection recorded during the testimony of a Crown witness and only does so after the witness has retired, no miscarriage of justice results where counsel for the accused fails to ask that the witness be recalled for further cross-examination and on appeal, does not allege what benefit such cross-examination would have been to the accused.
Regina v. Alward (1977), 32 C.C.C. (2d) 416 (N.B.C.A.)
4. The appellant appealed his conviction by way of trial de novo on a charge of assault to resist arrest. There was evidence of a record made at an earlier time, the truth of which was not something the witness could then attest to by reason of his memory. The court held: (per Brooke, J.A.) "In our view, there is authority that such evidence is, if the proper foundation is laid, admissible . . . In such cases, the record is the evidence . . ." The reported decision is of little factual assistance but it does affirm the existence of the doctrine of past recollection recorded in Canadian law, and it contains a list of the authorities on the point.
Salutin v. Regina (1980), 11 C.R. (3d) 284 (Ont.C.A.)

Present Memory Refreshed

If anything actually revives a witness' memory, it should be allowed to do so no matter who wrote it or when it was written.

F: A witness dictated to another notes related to certain events. He confirmed these notes of the other person as accurate. Much later he prepared his own set of notes based partly upon the other's earlier notes.

H: The witness could rely on these later notes made by himself to revive his recollection.

"This is not a case of past recollection recorded. It is a case where the witness seeks to stimulate his current recollection. He wishes to refer to it now in order to be able to give dates and times of meetings, the names of those present, the sequence of events and so on. He says that the notebook — he has gone over it a number of times — acts as a trigger for his memory. There is nothing unusual in this. Everyone has had the same experience, that is, a note, a number, a date, a name, may serve as a reminder of a whole series of recollections.

Wigmore on Evidence, 3rd ed. (1940) p. 125 para. 758, says that there is no hard and fast rule, that anything in writing may be used to stimulate and revive a recollection. On the other hand, it may be improper in a given instance to allow a witness to refer to something written down. It all depends on the circumstances. Wigmore, as always, provides ample justification in law as well as in common sense for these propositions.

Of course, there is a risk in allowing [the witness] to refer to his notebook, a risk that he may simply recite what is in his notebook without a genuine recollection of the events described. But in any case, it must be a question for the jury to decide to what extent he is relying on his present memory in giving his evidence in such circumstances."

Regina v. Bengert et al. (no. 5) (1980), 15 C.R. (3d) 21 (B.C.S.C.), affirmed by B.C.C.A. at 15 C.R. (3d) 160-163.

Contemporaneity

The document must have been made substantially at the same time as the occurrence of the events of which the witness is required to testify. No hard or fast rules can be set down for what constitutes contemporaneity. An interval of several weeks or six months has been held to exclude reference to the document.

R. v. Kinloch 25 How. St. Tr. 934

Jones v. Stoud, [1825] 2 C. & P. 196, 172 E.R. 89

Clarke v. B. C. Electric Railway, [1949] 1 W.W.R. 977 (B.C.S.C.)

Archibald v. The Queen (1956), 116 C.C.C. 62 (Que.S.C.)

Regina v. Gwozdowski (1973), 10 C.C.C. (2d) 434 (Ont.C.A.)

Use of Copies

If the original note is available, it should be used by the witness. When a copy of a document is sought to be used to refresh the memory of a witness, the witness must be able to show that while the matter was still fresh in his mind he compared the copy with the original note and found the copy to be correct.

Rex v. Elder (1925), 44 C.C.C. 75 (Man. C.A.)

A carbon copy of a note, made simultaneously with the original is as accurate (and apparently admissible) as the original.

Regina v. Alward (1977), 32 C.C.C. (2d) 416 (N.B.C.A.)

A witness is entitled to refresh his memory from a copy of a list of serial numbers taken from an original list. The copy was typewritten by the witness within five minutes after his receiving the original which was subsequently lost. This copy is valid secondary evidence which is admissible when a proper explanation for the absence of the primary evidence is given.

Rex v. Kearns (1945), 84 C.C.C. 357 (B.C.C.A.)

Use of Inadmissible Document to Refresh Memory

A witness may use a document to refresh his memory although the document itself is inadmissible.

Rex v. Gallant (1944), 83 C.C.C. 49 (P.E.I.S.C.)

Verification of Notes Made by Others

A witness who has not made the note himself, may refer to the notes of another to refresh his memory if he examined or otherwise verified the writing while the event was fresh in his mind and found the notes to be correct.

Rex v. Skwarchuk (1943), 78 C.C.C. 383 (Sask. Dist. Ct.)

F: Accused was charged with failing to remain at the scene of an accident and a witness had seen the vehicle which didn't stop. Witness wrote down the license number of the car and reported the incident to the police. The constable recorded the particulars in his notebook, but the witness did not actually see the number that he had written down. He broadcast the number in her presence over a radio and this was in fact the number she had given him. When testifying at trial, she couldn't remember the number and had lost the paper she had written it on. The Magistrate refused to allow the police officer to give evidence as to the license number nor would he allow the witness to look at the officer's notebook to refresh her memory. Crown Appeal by stated case.

H: Magistrate ought to have permitted the witness to refresh her memory from the constable's notebook because even though the evidence doesn't specifically show that the officer was reading his note when broadcasting, the witness' recognition of the number broadcast is sufficient verification of it.

Regina v. Davey, [1970] 2 C.C.C. 351 (B.C.S.C.) in Chambers, Aikins J.

Production of Document to Opponent

The opposing counsel has no right to see notes if they were not actually used to refresh the witness' memory. If so used, they must be produced for inspection and possible cross-examination upon by the opposing party. Only in instances of "past memory recorded" does the document itself become evidence per se of the matters contained therein.

Regina v. Vallillee (1954), 107 C.C.C. 405 (Ont. C.A.)

Isakson v. Jacobson (1945), 85 C.C.C. 45 (Sask. C.A.)

Opposing counsel has the right to inspect only those parts of the notes which refer to the subject matter of the case. Mere inspection does not render the document evidence unless cross-examination goes beyond the matters referred to by the witness for purposes of refreshing the witness' memory.

McLean v. Merchants Bank of Canada (1916), 27 D.L.R. 156 (Alta.S.C.)

In the past, a witness who used notes to refresh his memory prior to testifying but not during his actual testimony, was not required to produce them upon cross-examination.

Regina v. Kerenko et al., [1965] 3 C.C.C. 52 (Man. C.A.)

However, more recent cases have required production of notes used to refresh memory prior to court appearances even if not used during actual testimony.

Regina v. Musterer (1967), 61 W.W.R. 63 (B.C. Magistrate's Ct.)

Re Regina v. Monfils et al. (1971), 4 C.C.C. (2d) 163 (Ont.C.A.)

Refreshing Memory from Transcripts of Earlier Hearing

A witness for the Crown in examination-in-chief may have his memory refreshed by Crown counsel, not by reading his previous deposition to him, but by putting such statement in his hands and calling his attention to the part of it which contains his previous answers, i.e., to the part of the deposition in which the subject matter of his last answer is referred to but was answered in a different way. The deposition cannot be used by Crown or Defence counsel as part of the evidence in the case and it must not be read to the jury. It can only be used for the purpose of refreshing the witness' memory and nothing else.

Rex v. Laurin (No. 5) (1902), 6 C.C.C. 135 (Court of King's Bench, Que.)

Earlier hearing includes a preliminary inquiry and prior trial.

The problem here is that it is difficult to draw the line of distinction between questions designed to contradict your witness and questions designed to refresh his memory. You cannot cross-examine your own witness on previous inconsistent statements unless he has been declared hostile under Section 9 of the **Canada Evidence Act**. But it is clear that his previous depositions may be shown to the witness in order to refresh his memory if he asserts that his memory was better on the earlier occasion than it is now and if the witness adopts his former testimony it then becomes evidence.

Regina v. Williams (1853), 6 Cox C.C. 343

Melhuish v. Collier (1850) 19 L.J. Q.B. 493

Both cases approved in Regina v. Coffin (1956), 23 C.R. 1 (S.C.C.)

A witness at a trial may read his own evidence given at preliminary hearing for purposes of refreshing his memory. The reading may be done before or during the trial. Reading preliminary evidence of others affects its weight, not admissibility and would be grounds for judicial censure.

Regina v. Coffin (1956), 114 C.C.C. 1 (S.C.C.)

Regina v. Laurin (No. 5) (1902), 6 C.C.C.135 (Que.K.B.) leading case.

Regina v. Garand (1958), 29 C.R. 324 (B.C.Co.Ct.)

Regina v. Husbands (1973), 24 C.R.N.S. 188 (Ont.Co.Ct.)

A witness' deposition at the trial of a summary conviction offence may be shown to him on his examination-in-chief at trial de novo appeal.

Regina v. Marshall, [1965] 4 C.C.C. 35 (Alta.Dist.Ct.)

In a case where an unduly long interval had elapsed between statements by witnesses for the prosecution made fairly soon after the events forming the subject matter of the Indictment and the trial and the prosecution had taken the initiative of telling the witnesses that they might refresh their memories, if they wished, by reading their previous statements.

HELD, that the course adopted was not open to objection.

Regina v. Richardson (1971), 55 Cr.App.R. 244 (Eng. Court of Appeal) (Criminal Division)

Police Officers' Notebooks

Police officers may refresh their memories from notebooks or statements prepared by them

in collaboration shortly after the events as long as each officer declares under oath that it was a true account according to his own knowledge and recollection when he made the notes.

Regina v. Bass, [1953] 1 Q.B. 680 (Court of Crim.App.England) — leading case

Archibald v. The Queen (1956), 116 C.C.C. 62 (Que.S.C.)

RELEVANCE

Introduction

Relevancy is the relationship between facts which tend to prove or disprove the issue in dispute. All evidence which is logically probative (relevant) is admissible unless it infringes an exclusionary rule. There is no specific legal test for relevance. Common sense and principles of logic must be applied to determine the relevancy or irrelevancy of any evidence tendered.

To be Determined by Trial Judge

The question of relevancy is for the trial judge to decide. The jury is to assess its weight. Some evidence only becomes relevant when its relationship to other evidence becomes obvious. A Judge may wish to conditionally admit some disputed evidence upon an undertaking by the proponent to establish its relevance through other evidence to be introduced later. If this later evidence does not demonstrate the relevancy of the disputed evidence, the jury must be instructed to disregard it or a mistrial may be declared.

Regina v. Dass (1979), 8 C.R. (3d) 224 (Man. C.A.)

Regina v. Spence (1979), 47 C.C.C. (2d) 167 (Ont.C.A.)

Relevance and Admissibility

The function of the court is to determine admissibility based on accepted rules of evidence and the court is not to exclude evidence solely due to unfairness to the accused if otherwise admissible. "The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly." For example, if evidence is substantially relevant, is no discretion to exclude.

Queen v. Wray, [1970] 4 C.C.C. 1 at 17 (S.C.C.)

Applied in Regina v. Wray (No. 2) (1971), 4 C.C.C. (2d) 378 (Ont.C.A.); affirmed (1974), 10 C.C.C. (2d) 215 (S.C.C.)

Also applied in Regina v. Glyn (1972), 5 C.C.C. (2d) 364 (Ont.C.A.)

Also applied in Regina v. MacDonald (1974), 27 C.R.N.S. 212 (Ont.C.A.)

Also applied in Regina v. LeBlanc (1976), 29 C.C.C. (2d) 97 (S.C.C.)

Also applied in Regina v. Ma (1979), 44 C.C.C. (2d) 511 (Ont.C.A.)

Credibility as an Issue of Fact

The issue of credibility is one of fact and cannot be determined by following a set of rules that it is suggested have the force of law — it is a matter in which so many human characteristics, both the strong and the weak, must be taken into consideration. The general integrity and intelligence of the witness, his power to observe, his capacity to remember and his accuracy in statement are important. It is also important to determine whether he is honestly endeavouring to tell the truth, whether he is sincere and frank or whether he is biased, reticent and evasive. All these questions and others may be answered from the observation of the witness' general conduct and demeanour in determining the question of credibility.

White v. The King (1947), 89 C.C.C. 148 (S.C.C.) per Estey, J. at 151.

RE-OPENING THE CASE

Introduction

Cases before 1978 indicated some reluctance to allow the Crown to re-open its case if the accused would thereby be potentially or actually prejudiced. Many factors were judicially considered in relation to unfair prejudice in the exercise of a Judge's discretion. However, since 1978, the test has been clarified and earlier cases must be considered with caution.

Discretion of Trial Judge

The decision to allow the Crown to re-open its case is within the discretion of the trial Judge.

Rex v. Gregoire (1927), 47 C.C.C. 288 (Ont.C.A.)

Rex v. Ash-Temple Co. et al. (1949), 93 C.C.C. 267 (Ont.C.A.)

This discretionary power will not be interfered with unless an actual injustice has occurred.

Robillard v. The Queen (1978), 41 C.C.C. (2d) 1 (S.C.C.)

Test

The discretion to permit the Crown to re-open its case will not be interfered with unless an injustice has resulted. Further, this discretion is not subject to the limitation of matters which arise ex improviso "which no human ingenuity could have foreseen".

Robillard v. The Queen (1978), 41 C.C.C. (2d) 1 (S.C.C.)

Prejudice to Accused

It is not enough that an accused may suffer prejudice by the re-opening in cases where he may have already testified or elected to call no evidence. This discretionary power will not be interfered with unless an actual injustice has resulted.

Robillard v. The Queen (1978), 41 C.C.C. (2d) 1 (S.C.C.)

Factors Which Have Been Considered:

1. Conduct of defence — did it alert the Crown to deficiencies of proof by objections or wait silently and thereby abet the omission?
2. Discovery of fresh evidence by Crown.
3. Was the omission inadvertent — an oversight?
4. Ease with which evidence of omitted matter may be called, e.g., witnesses are readily available.
5. Prejudice to the defence, e.g., it has elected to call no evidence or has closed its case. This may be met by allowing defence to also re-open its case to meet or further argue the Crown's case.
6. The type of omission — was it of a technical nature such as proof of a statute or a rule of procedure.
7. The interests of justice which include the rights of the accused and the rights of society in seeing that all relevant evidence is put before the court.

Examples Where Re-Opening Allowed:

- F: Crown inadvertently closed its case without calling some witnesses named on the back of the indictment charging murder or manslaughter. Defence moved for directed verdict and then Crown moved to re-open the case.
- H: The trial Judge properly exercised his discretion to allow the case to be re-opened in the interests of justice.
Rex v. Gregoire (1927), 47 C.C.C. 288 (Ont.C.A.)
- F: Prosecution failed to prove that defendant was owner of vehicle bearing certain licence number. Defence moved for non-suit on this absence of proof. Crown allowed to re-open to prove the absent fact.
- H: Was a proper exercise of discretion to allow re-opening and further evidence. However appeal failed for lack of proof driver in charge of vehicle with defendant's consent.
Rex v. Smith (1927), 48 C.C.C. 249 (Sask.K.B.)
- F: Crown inadvertently omitted to prove a proclamation bringing into force the Dominion statute constituting the offence charged. Defence moved for acquittal and Crown moved to re-open case. Trial Judge allowed Crown to re-open.
- H: The Judge had a discretion to allow case to be re-opened and this was exercised in the interests of justice with no prejudice to the accused. Was a mere matter of deficiency of formal proof.
Rex v. Kishen Singh (1941), 76 C.C.C. 248 (B.C.C.A.)
- F: On a manslaughter trial Crown had not proved that accused was driver of the automobile at the time of the accident. Defence moved for a non-suit on this ground at close of Crown's case.
- H: Non-suit motion cannot lie. Defence could have declared he had no evidence to offer and then raised the question of lack of proof of an essential element in argument.
"Having discovered that its evidence was incomplete, the Crown has a perfect right to complete it in order to bring the facts before the Court."
Rex v. Perreault (1941), 78 C.C.C. 236 (Que.Sup.Ct.) per Langlais, J. at 237. Approved by S.C.C. in Robillard v. The Queen (1978), 41 C.C.C. (2d) 1 (S.C.C.)
- F: Accused charged with conspiracy to sell narcotic drugs. On appeal it was argued that there was a defect in the proof that the substance in question was in fact a narcotic drug. The Court of Appeal permitted formal proof to be given of this fact.
- H: Was a proper procedure to correct the omitted evidence.
Kissick et al. v. The King (1952), 102 C.C.C. 129 (S.C.C.)
- F: Accused charged with illegal export of goods made of iron or steel. At close of prosecution's case, defence submitted was no case to answer because was no evidence goods made of steel or iron. Crown witness recalled to testify to material exported.
- H: Was a proper exercise of discretion to allow re-opening and recalling of witness.
Regina v. McKenna (1956), 40 Cr.App.R. 65 (Eng.Ct. of Crim.App.)
- F: Crown omitted to prove the necessary consent to the prosecution.

- H: Justices should have allowed the necessary consent to the prosecution to be given by Crown on re-opening because was a matter of procedure not substance.
Price v. Humphries, [1958] 2 All E.R. 725 (Eng.Ct. of Crim.App.)
- F: At trial Crown moved to re-open to prove that accused was present at preliminary hearing when deposition was made by deceased witness whose evidence was read in at the trial. Trial Judge refused to allow motion.
- H: Appeal by Crown granted as the re-opening should have been granted. The defence could not be prejudiced by proof of a formal matter of procedure. Witness to be heard by Court of Appeal.
Regina v. Huluszkiw (1962), 37 C.R. 386 (Ont.C.A.)
- F: Defence agreed to the introduction of two expert certificates but reserved his right to argue their meaning in such a way that Crown counsel believed that the certificates had become evidence. Defence elected to call no evidence and argued that the certificates were not proper proof on essential element. Crown moved to re-open its case to prove the contents of the certificates by viva voce evidence and trial Judge allowed it.
- H: Was a proper exercise of discretion by trial Judge because was a technical non-compliance with a statute by the Crown and the conduct of the defence counsel contributed to the failure by Crown to call the essential evidence.
Regina v. Champagne et al., [1970] 2 C.C.C. 273 (B.C.C.A.)
- F: Crown witnesses mistakenly gave evidence as to events occurring on July 23rd instead of July 24th. After Crown closed its case, defence without electing to call no evidence, moved for a dismissal on basis of no evidence that offence occurred on July 24th as alleged in charge. Judge allowed Crown to re-open to correct erroneous evidence as to dates.
- H: Proper exercise of discretion since no prejudice to accused who had not elected.
N.B. — This case based discretion on lack of prejudice to accused because could call defence evidence after recalled Crown witnesses. Robillard v. The Queen allows for re-opening after defence election to call no evidence.
Regina v. Cachia (1974), 17 C.C.C. (2d) 173 (Ont.H.C.J.)
- F: Evidence of witness at preliminary read into robbery trial and Crown closed case without identifying accused as person referred to in transcript. Defence called no evidence and after Crown addressed jury, argued no evidence as to identity. Judge allowed Crown to re-open and prove identity.
- H: Proper exercise of discretion.
Robillard v. The Queen (1978), 41 C.C.C. (2d) 1 (S.C.C.)
- F: Witness testified as to a rifle shown to him by accused. Another witness testified that accused had sold a gun and a gun-case after the shooting. First witness recalled by defence to state that gun-case was similar to one shown him by accused. Defence submitted to jury that since gun in gun-case was different from murder weapon accused not guilty. Crown re-open to recall first witness to testify that gun-case similar but gun produced by defence in court was not the gun shown to witness by accused before the murder.
- H: Proper to allow Crown to re-open case to clarify this issue.
Regina v. Stewart (1981), 54 C.C.C. (2d) 93 (Alta.C.A.) Leave to appeal to S.C.C. refused loc. cit.
- F: At a preliminary inquiry, after hearing evidence and argument, Judge concluded there was

insufficient evidence on one element and directed that Crown be permitted to reopen case and adduce further evidence.

- H: Was a proper exercise of discretion pursuant to section 465(1)(i) of the **Code**.
Regina v. Baiocchi (Feb., 1985), unreported (Ont. S.C.)

Examples Where Motion by Crown Refused:

- F: After defence had closed its case, the prosecution sought to re-open its case and call evidence of handwriting experts in a forgery case.
- H: Was an error to allow Crown to re-open its case.
Rex v. Day (1940), 27 Cr.App.R. 168
 N.B. — This case noted but not followed by S.C.C. in *Robillard v. The Queen* (1978), 41 C.C.C. (2d) 1 (S.C.C.)
- F: After jury had deliberated for some time, they returned to court and requested a view of the locus in quo. Judge granted this request without allowing counsel a further opportunity to address the jury. During the view the victim pointed out a different spot from that indicated in her testimony.
- H: New trial ordered because of discrepancy in victim's evidence and inadmissibility of recent complaint. Was a situation of jury, not Crown requesting re-opening.
Rex v. Marsh (1940), 74 C.C.C. 312 (B.C.C.A.)
 N.B. — This case was noted but not followed by S.C.C. in *Robillard v. The Queen* (1978), 41 C.C.C. (2d) 1 (S.C.C.)
- F: Crown closed its case and defence moved for directed verdict and indicated that no defence would be called. Throughout the trial the defence had repeatedly objected to the evidence thereby putting Crown on notice as to the deficiencies. After nonsuit motion, and a week after closing its case, Crown moved to re-open to call further witnesses although their identify and evidence was not disclosed. Trial Judge refused to allow re-opening.
- H: Was a proper exercise of discretion by trial Judge. Crown counsels were constantly alerted to the very deficiencies which they later sought to prove through later witnesses.
Rex v. Ash-Temple Co. et al. (1949), 93 C.C.C. 267 (Ont.C.A.)
- F: Crown counsel asked witness what happened on May 16 instead of the correct date of March 16 as in the charge. Defence elected to call no evidence after close of Crown's case and moved for a dismissal. Crown moved to re-open and recall witness. Trial Judge allowed it.
- H: Trial Judge improperly allowed Crown to re-open. This was neither an inadvertent omission, nor a supplementing of a deficiency in the evidence, nor a situation where the defence was partly responsible for the omission. Rather it was simply recalling a witness to change and correct evidence already given.
Regina v. Dunn, [1970] 3 C.C.C. 424 (B.C.S.C.)
 N.B. — This case is clearly contrary to *Regina v. Cachia* (1974), 17 C.C.C. (2d) 173 (Ont.S.C.)

To Correct Errors in Procedure

A Magistrate may re-open to correct himself and retrace his steps to the point where he erred on a matter of procedure so as not to lose jurisdiction so long as he has not made a decision on the merits of the case.

- F: Magistrate failed to give defendant an opportunity to plead to the complaint in an affiliation proceeding. When defence counsel applied for a dismissal on the ground that no plea had been taken, Magistrate re-opened case and asked the defendant to plead, had the witnesses recalled and the evidence reheard.
- H: Prohibition against Magistrate refused because he had not lost jurisdiction and had a perfect right to retrace his steps to comply with the correct procedure.
Belyk v. McSherry (1947-8), 4 C.R. 293 (B.C.S.C.)

Time for Re-opening

A trial Judge without a jury can re-open the defence case after a finding of guilt anytime before sentence. He is not functus until sentence pronounced. This power to be used only in exceptional circumstances. In a jury trial there is no power to put aside a verdict and allow further evidence.

Regina v. Lessard (1976), 30 C.C.C. (2d) 70 (Ont.C.A.)

Re-opening Defence Case

In certain circumstances the defendant may move to re-open the case. See for example **Regina v. Lessard** (1976), 30 C.C.C. (2d) 70 (Ont.C.A.)

- F: Accused charged with break, enter and theft and possession of goods from break and enter was convicted of break, enter and theft and acquitted on second count on basis of **Kienapple** rule precluding convictions for same matter. Defendant then moved to reopen break, enter and theft conviction.
- H: Refusal to allow defence to re-open first count was correct. If trial Judge had re-opened the conviction on count number one he could also have set aside the acquittal on count number two.
Regina v. Schmidt et al. (1982), 66 C.C.C. (2d) 366 (Ont.C.A.) Leave to appeal to S.C.C. refused loc. cit.

REPLY EVIDENCE

Introduction

Reply or rebuttal evidence is a separate stage in a trial and should not be confused with the re-examination of a witness or the re-opening of the Crown's case. The general principle is that the Crown must introduce all the evidence in its possession upon which it relies as probative of guilt and it is forbidden to split its case by calling some of its witnesses before the defence evidence and the remaining witnesses after to merely confirm its *prima facie* case.

Regina v. Michael (1954), 110 C.C.C. 30 (Ont.C.A.)

Regina v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont.C.A.)

However several situations may arise where the Crown is entitled to call evidence to contradict new issues raised by the defence.

Discretion of Trial Judge

The trial Judge has the discretion to allow reply evidence to be adduced by the prosecution. This discretion should be exercised in a manner consistent with the authorities.

Rex v. Crippen, [1911] 1 K.B. 149 (Eng. Ct. of Crim. App.)

Regina v. McKenna (1956), 40 Cr.App.R. 65 (Eng. Ct. of Crim. App.)

This discretion may be exercised more liberally in a judge alone case because there is less danger of the last word affecting the verdict.

Regina v. Paczier (1956), 117 C.C.C. 310 (Ont.C.A.)

Must be Admissible and Relevant

Reply evidence must be admissible in law and relevant to an issue in dispute.

Rex v. Davis and Toubret (1951), 102 C.C.C. 226 (N.S.C.A.)

Evidence which is clearly material and relevant to guilt and is known to the Crown should be adduced as part of the prosecution's case and not after the evidence for the defence.

Regina v. Perry and Franks (1977), 36 C.C.C. (2d) 209 (Ont. C.A.)

A matter which may be only marginally relevant when considered in relation to the complete Crown's case may become more significant when the accused testifies and makes it a live issue. Reply evidence then becomes admissible.

Regina v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont.C.A.)

Regina v. Sparrow (1980), 51 C.C.C. (2d) 443 (Ont.C.A.)

Reply evidence which could have been called in the Crown's case may be admitted if it links the accused with the crime although its marginal relevance does not arise *ex improviso* during the defence case unless it was elicited to trap the accused.

Rex v. Crippen (1910), 5 Cr.App.R. 255 (Eng.Ct.of App.)

Regina v. Campbell (1977), 38 C.C.C. (2d) 6 (Ont.C.A.)

Fresh Matter

"Whenever the accused, in defence, gives evidence of fresh matter which the prosecution could not foresee . . . the prosecution is entitled to contradict it, provided such evidence be not merely confirmatory of the original case, for then it should have been tendered at first."

Phipson on Evidence (8th ed.) p. 38 quoted in

Rex v. Therien and Sanseverino (1943), 80 C.C.C. 87 (B.C.C.A.) at 90.

To Meet Defence of Alibi

When defence sets up an alibi, Crown can call reply evidence to contradict it.

Rex v. Therien and Sanseverino (1943), 80 C.C.C. 87 (B.C.C.A.)

Regina v. Flynn (1957), 42 Cr. App. R. 15 (Eng.Ct.of Crim.App.)

To Meet Collateral Matters

Generally, the answers of a witness on collateral matters, which are not related to facts in issue, are final and may not be contradicted. However, when an accused or a defence witness testifies-in-chief on any matter, rebuttal evidence may be called to meet this defence evidence.

F: Accused testified in examination-in-chief as to his supposedly reputable business dealings for the purpose of attempting to establish that he was a substantial businessman not likely to have engaged in the offences charged. Crown called reply evidence to show accused's businesses were not substantial.

H: Reply evidence was properly admitted even though collateral to the main issue. "The appellant's counsel relies on the principle that where a witness is cross-examined in regard to collateral matters the party cross-examining is bound by the witness' answer and may not give evidence in reply to contradict the answer. The present case does not fall within the ambit of this rule. The evidence in reply was in respect of matters introduced in examination-in-chief. Evidence-in-chief, to be admissible, must be relevant to the issues being tried and reply evidence may be called in respect of any matters that counsel in examination-in-chief elect to introduce."

Regina v. Gross (1973), 9 C.C.C. (2d) 122 at 124 (Ont.C.A.), leave to appeal to S.C.C. refused [1973] S.C.R.

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As to Description of Perpetrator

When a Crown witness is cross-examined as to a description of the assailant given to another person, such cross-examination designed to show that the earlier description was different from the evidence given at trial, the Crown can recall the recipient of the description to relate what he was told by the Crown witness.

Rex v. Clarke (1906), 12 C.C.C. 299 (N.B.C.A.)

To Credibility of Crown Witness:

If the credibility of a witness is in issue and relates directly to the guilt or innocence of an accused, reply evidence may be admitted.

F: Crown witness (an accomplice) testified as to assisting accused in trafficking in narcotics. Accused called witnesses to testify that Crown witness' story was false and that she was trafficking on her own account. Crown was permitted to call reply evidence to establish innocence of Crown witness by means of an alibi.

H: Reply evidence was properly admitted as relevant to guilt or innocence of accused. The credibility of the Crown witness was not merely collateral here.

Regina v. Shewfelt (1972), 18 C.R.N.S. 185 (B.C.C.A.)

To Rebut Evidence of Accused's Intent

If accused testifies to some matter which relates to his intent/knowledge, the Crown can call evidence to rebut this. Any evidence relevant to intent is not collateral.

F: On a double murder charge, accused testified to a supposedly improper incident which occurred between 2 victims at a bar. Crown called reply evidence to show that the incident was not improper.

H: Evidence in reply was admissible as not collateral since it was relevant to the intent of accused.

Regina v. Browning (1977), 34 C.C.C. (2d) 200 (Ont.C.A.)

Sur-rebuttal Evidence:

If the Crown has been permitted to call reply evidence, the defence may be permitted to call further evidence to meet the Crown's evidence. The evidence given by the defence (also called counter-rebuttal) is limited to the issues raised for the first time by the Crown in its reply evidence.

Regina v. Morgentaler (no. 4) (1973), 14 C.C.C. (2d) 455 (Que.Q.B.)

The need for sur-rebuttal evidence will arise rarely because the Crown's reply evidence will usually be given to meet issues raised by the defence and will be confined to those issues only. Therefore the defence will have had notice of the particular issue when it called its case-in-chief and its sur-rebuttal evidence would thereby be merely confirmatory.

RES GESTAE

Introduction

This type of statement is made in circumstances which indicate reliability and is the best evidence available. It is made by either a victim or a bystander indicating directly or indirectly the identity of the attacker. It is generally considered to be an inclusionary doctrine.

Cross, Evidence (5th ed., 1979) p. 575.

It is based on two propositions — that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the dissociation of the words from the action would impede the discovery of the truth.

Teper v. The Queen, [1952] A.C. 480 (H. of L.)

Some writers class this as an exception to the hearsay rule, others do not. If an event is in issue, then things said as well as done, constitute the event. It is submitted that a statement which is admitted as part of *res gestae* is original evidence, i.e., it is evidence of the truth of the explanation asserted and is explanatory of the act or incident it accompanies.

Teper v. The Queen, [1952] A.C. 480 (H. of L.)

Ratten v. The Queen, [1971] 3 All E.R. 801 (P.C.)

Regina v. Mahoney (1979), 50 C.C.C. (2d) 380 (Ont.C.A.), appeal to S.C.C. dismissed 1980.

Defined

“Acts, declarations and incidents which constitute, or accompany and explain, the fact or transaction in issue, are admissible, for or against either party, as forming parts of the *res gestae*.”

Phipson on Evidence (11th ed.) par 171

The Utterance as Explanatory

An utterance may be part of an act. Conduct alone may be ambiguous. For example, A may be seen handing money to B but the legal significance of the handing over of the money is unclear without the accompanying words — was it a gift or a bribe? This category is limited as follows: (1) the words must accompany the conduct; (2) the conduct must be equivocal; (3) the words must aid in giving legal significance to the conduct; (4) the conduct must be independently material to the issue.

Requirements

1. The statement must be relevant to a fact in issue, e.g., rebuts accused's defence or demonstrates emotional state of victim.
2. Statement must be circumstantially connected to event, i.e., contemporaneous and spontaneous to preclude possibility of concoction by maker of statement.
Ratten v. Regina, [1971] 3 All E.R. 810 (Privy Council)
3. The statement should explain or qualify the act in issue, e.g., statements accompanying the handing over of a deed are admissible to show it was a gift.
Morgan, Basic Problems of State and Federal Evidence (5th ed. 1976) at pp. 287-288
4. Statements should not just be reports by witnesses of events which they have seen.

Duration of Transaction

“A transaction may be a continuous one extending over a long period. In such case any words or statements accompanying such continuous transaction at any time during its continuance are admissible as part of it.”

Rex v. Walkem (1908), 14 C.C.C. 122 per Morrison, J. at 127 (B.C.C.A.)

Actions Included

Res gestae includes conduct as well as statements. On a charge of criminal negligence causing death, evidence that accused skidded, swerved, etc., after hitting victim was admissible as part of res gestae.

Balcerczyk v. The Queen (1956), 117 C.C.C. 71 (S.C.C.)

Use of for Purposes of Identification

For identification purposes in a criminal trial, the event with which the words sought to be proved must be so connected as to form part of the res gestae as the commission of the crime itself — the throwing of the stone, the striking of the blow, the setting fire to the building, or whatever the criminal act may be. (Semble if used for example to explain an otherwise ambiguous action, may be less closely connected in time, place, and circumstance.)

Teper v. The Queen, [1952] A.C. 480 (Privy Council)

N.B. — This limitation has been eliminated by later cases.

The evidence of a person as to identification can be given through witness to whom identification made at scene as part of res gestae whether the statement was made before, after or during the transaction.

F: Victim assaulted by L. Victim returned to own car and awaited police. Victim pointed out L as his assailant to police officer at scene before L was arrested. At trial victim not asked to identify L and only identification was by police officer who identified L as person pointed out by victim at scene.

H: Evidence of identification admitted as part of res gestae.

Regina v. Nye and Loan (1978), 66 Crim.App.R. 252 (Eng.Ct.of App.)

See also Regina v. Mahoney (1980), 50 C.C.C. (2d) 380 (Ont.C.A.). Appeal to S.C.C. dismissed 1980.

On a Possession Charge

F: On a charge of possession of stolen goods, when police confronted accused with goods, he immediately denied knowledge of them. In a subsequent written statement, he explained his possession.

H: First oral statement made when accused first found in possession admissible as part of res gestae.

Graham v. The Queen (1972), 7 C.C.C. (2d) 93 (S.C.C.)

Regina v. Risby, [1978] 2 S.C.R. 139 (S.C.C.)

Such a res gestae statement is admissible without voir dire.

Regina v. Spencer (1973), 16 C.C.C. (2d) 29 (N.S.C.A.)

Contemporaneity

It is essential that the words sought to be proved by hearsay, should be if not absolutely

contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement.

Teper v. The Queen, [1952] A.C. 480 (Privy Council)

F: Deceased came out of house after her throat cut and made statements about her attacker.

H: Statements not admissible because all action had ceased when statement made.

Rex v. Bedingfield 14 Cox C.C. 341 (Eng. Crown Ct.)

N.B. — Much criticized decision and clearly not law in Canada in view of *Gilbert v. The King*, *infra*. Also no longer law in England in view of *Regina v. Ratten*.

F: Deceased, after being shot and while pursued by accused was shouting to witnesses to “hold on, he shot me and will do it again, hold on”.

H: Evidence of this statement is admissible as part of *res gestae* because was made immediately after shooting and while speaker under apprehension of further danger and requesting assistance and protection, i.e., was a continuity of circumstances.

Gilbert v. The King (No.2) (1907), 12 C.C.C. 127 (S.C.C.)

F: Deceased had been threatened in upstairs bedroom by accused, left house and went to neighbour’s house. Deceased told neighbours that accused and tried to kill her and that he was liable to shoot through the window.

H: This evidence of statements made by deceased was admitted because the effort to murder was a continuous transaction from the attack in the bedroom until consummated by the fatal shot. The statements of deceased tended to explain the incident and corroborate other evidence.

Rex v. Wilkinson (1934), 62 C.C.C. 63 (N.S.C.A.)

F: Statements were made by the victim of assault (who was called as a witness at trial) to witnesses standing outside room in hotel hallway while the accused was beating her.

H: Statements admissible through witnesses who were at doorway as part of *res gestae* because were made when disturbance still in progress and victim was being pursued by accused.

Rex v. Cohen, [1947] O.W.N. 336 (Ont.C.A.)

F: On action for damages for negligence against company, was sought to have statement of deceased employee who fell into container of chromic acid, admitted. Statement, “I shouldn’t have done it” was made within a period described as from seconds to two minutes after he had been assisted out of the bath.

H: What employee said immediately after the accident was admissible as part of *res gestae*.

Davies v. Fortior Ltd., [1952] 1 All E.R. 1359 (Eng.Q.B.)

F: Deceased victim during afternoon told assistant that he (victim) had received phone call regarding delivering golf clubs and was going to deliver them that evening. Victim never heard from after 9 p.m. that evening. Crown’s theory was that accused lured victim to house, murdered him and disposed of body.

H: Statement of deceased to assistant admissible as part of *res gestae* because closely associated in time, place and circumstances and so interwoven with his actions as to be part of his

disappearance and explanatory thereof.

Regina v. Workman and Huculak, [1963] 1 C.C.C. 297 (Alta.C.A.), appeal to S.C.C. dismissed Feb. 11, 1963.

- F: Call made to telephone operator 3 - 5 minutes before shot by husband. Operator heard "get me the police please" and address of caller spoken by hysterical person.
- H: Evidence from operator, i.e., words heard and state of speaker admissible as part of *res gestae* as relevant to rebut defence of accident, so closely connected to event as to be part of it and impossible for speaker to fabricate.
Ratten v. Regina, [1971] 3 All E.R. 801 (Privy Council)
- F: Witness was awakened and shaken by deceased who said, "Billy stabbed me" and then flopped onto bed unconscious from multiple stab wounds. She died within next few hours.
- H: Statement admissible as part of *res gestae* because was sufficiently contemporaneous with event, i.e., with the stabbing (and also admissible as dying declaration).
Regina v. Mulligan (1973), 23 C.R.N.S. 1 (Ont.S.C.), appeal dismissed [1977] 1 S.C.R. 612 (S.C.C.)
- F: Statements made by victim after he was taken into house at least 1/2 hour after shooting when victim came to witness' house and asked to be taken in because he was shot were sought to be admitted.
- H: Statements inadmissible because all action had ceased and all pursuit or danger had passed when now deceased victim made statements.
Regina v. McMahon et al. (1889), 18 O.R. 502 (Ont.H.C.Q.B.Div.)
- F: Deceased made statements to witnesses almost two weeks after the offence and approximately 5 days before his death to the effect that he was dying from poison given to him by the accused.
- H: Statements not admissible as part of the *res gestae* because were too much separated by time and circumstance from the criminal act of poisoning.
Chapdelaine and The King (1934), 5 C.R. 53 (S.C.C.)
- F: Victim stabbed during scuffle in bathroom, and a few (2 - 5) minutes later, victim said, "B stabbed me", walked downstairs, collapsed and died.
- H: Statement not admissible because fighting had ceased and victim not being pursued when he made statement.
Rex v. Leland (1951), 11 C.R. 152 (Ont.C.A.)
- F: Witness testified to statements made by bystander "your place burning and you going away from the fire" spoken some 220 yards from site of fire and about 26 minutes after fire was started. Was a charge of arson.
- H: Statements were not admissible because separated too greatly from time and place of act charged.
Teper v. The Queen, [1952] A.C. 480 (Privy Council)
- F: Victim was involved in auto collision and got out of car to inspect damage when he was assaulted. He returned to his vehicle and when police arrived later he pointed out assailant to them.
- H: Identification by victim at scene admissible through police officer as part of *res gestae*.
Regina v. Nye and Loan (1978), 66 Crim.App.R. 252 (Eng. Ct. of Crim. App.)

- F: Accused whose first name was Jack was charged with murder. Moments before killing, deceased heard to say "Jack, what are you doing" or "no, Jack".
- H: Words spoken by deceased were capable of being evidence of identification of perpetrator, i.e., was substantive evidence per se and was admissible for the truth of what was asserted in it.

Regina v. Mahoney (1980), 50 C.C.C. (2d) 380 (Ont.C.A.), appeal to S.C.C. dismissed 1980.

STATEMENTS

Introduction

Statements by a defendant are out of court declarations which are exceptions to the hearsay rules. They are sometimes subdivided into “admissions” which is a statement that by itself is not sufficient to warrant an inference of guilt but which tends to prove guilt when considered with the rest of the evidence and “confessions” which disclose an accused’s participation in a crime and his guilt for that crime.

A statement to a person in authority is not admissible until it has been shown that it was freely and voluntarily given, that is that it was made without fear of prejudice or hope of advantage held out or exercised by a person in authority.

Ibrahim v. The King, [1914] A.C. 599 (Eng.Privy Council)

Voir Dire Generally

A voir dire, or “trial within a trial” is held to determine whether a statement is admissible in evidence. The onus is upon the Crown to prove admissibility beyond a reasonable doubt.

Regina v. Lee (1952), 104 C.C.C. 400 (Ont.C.A.)

Regina v. Pickett (1975), 28 C.C.C. (2d) 297 (Ont.C.A.)

On a voir dire the trial Judge whether sitting alone or with a jury is required to determine whether a statement was voluntary and whether there is some evidence that it was made. Once it is ruled admissible, he or the jury must decide, after hearing all the evidence at the trial, what the statement was and whether it was true. The evidence heard on the voir dire cannot be applied to the merits of the case unless both the Crown and the defence consent. Otherwise, the defendant would be given an unfair advantage, since when he testifies during a voir dire his cross-examination is restricted to credibility and the matters in issue on the voir dire, but when he testifies during the trial proper he is treated as an ordinary witness, and may be cross-examined on all the facts of the case.

Regina v. Gauthier (1976), 27 C.C.C. (2d) 14 (S.C.C.)

In view of the decision of the Supreme Court of Canada in *Erven v. The Queen*, it is strongly submitted that a voir dire be held in all cases where a statement is tendered as evidence, unless the defendant or his counsel clearly waives the holding of a voir dire. See NO NECESSITY FOR VOIR DIRE *infra*.

Erven v. The Queen (1978), 44 C.C.C. (2d) 76 (S.C.C.)

No Necessity for Voir Dire

When an accused or his counsel clearly and unequivocally indicates that the statement tendered by the prosecution was voluntarily made a voir dire is not necessary.

Regina v. Dietrich, [1970] 3 O.R. 725 (Ont.C.A.)

Regina v. Swezey (1974), 27 C.R.N.S. 163 (Ont.C.A.)

Park v. The Queen (1981), 59 C.C.C. (2d) 385 (S.C.C.)

Judge’s Rules:

1. When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof, to any person or persons whether suspected

or not from whom he thinks that useful information can be obtained.

2. Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking him any questions, or any further questions, as the case may be.
3. Persons in custody should not be questioned without the usual caution first being administered.
4. If the prisoner wishes to volunteer any statement the usual caution should be administered. It is desirable that the last two words (“against you”) of such caution should be omitted and that the caution should end with the words “be given in evidence”.
5. The caution to be administered to a prisoner when he is formally charged should therefore be in the following words: “Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.” Care should be taken to avoid any suggestion that his answer can only be used in evidence against him as this may prevent an innocent person making a statement which might assist to clear him of the charge.
6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such cases he should be cautioned as soon as possible.
7. A prisoner making a voluntary statement must not be cross-examined and no question should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and a day of the month which do not agree, or has not made it clear to what individual or to what place he intended to refer in some part of this statement, he may be questioned sufficiently to clear up the point.
8. When two or more persons are charged with the same offence and statements are taken separately from them, the police should not read these statements to other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply the usual caution should be administered.
9. Any statements made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

The above Judge’s Rules do not have the authority of a rule of law but rather are administrative directions for the guidance of the police. If a statement is obtained which contravenes the rules, it may nevertheless be admitted in evidence provided it was made voluntarily.

R. v. Thompson, [1893] 2 Q.B. 12 (Crown Cases Reserved)

Rex v. Voisin, [1918] 1 K.B. 531 (Eng. Ct. of Crim. App.)

Regina v. Bass, [1953] 1 Q.B. 680 (Eng. Ct. of Crim. App.)

The Queen v. Fitton (1956), 116 C.C.C. 1 (S.C.C.)

Use of Statement by Crown

It may in certain cases be advisable to tender any or all statements made by an accused and contradict the untruthful portions with other extrinsic evidence. This discretion remains that of the prosecution.

The rule is that no statement is evidence unless the Crown wishes to make it evidence.

Regina v. Haase, [1965] 2 C.C.C. 56 (B.C.C.A.) affirmed by S.C.C. [1965] 2 C.C.C. 123.

“What the prisoner says is not evidence, unless the prosecution chooses to make it so by using it as part of its case against the prisoner.”

Rex v. Hughes et al. (1942), 78 C.C.C. 275 (S.C.C.)

A Judge cannot direct that an accused's statement be put into evidence.

Regina v. Adams et al. (1956), 25 C.R. 80 (N.S.S.C. in Banco)

Regina v. Williams, [1971] 1 O.R. 703 (Ont.H.C.J.)

Use of Statement by Accused

The general rule is that the party cannot create evidence for himself. This is called self-serving evidence. “Any statement made by a defendant in reference to a criminal transaction, either before or after the transaction has taken place, is not, as a rule, evidence in his favour, for where the statement is a confession of guilt, or an admission of facts tending to the proof of guilt, it is received in evidence upon the presumption that a person will not make an untrue statement against his own interest, but no such presumption arises in respect of a statement made in his own favour; otherwise a defendant could make a statement to suit his own case.”

Shaw's Evidence in Criminal Cases (3rd ed.) 26.

The defence cannot put in a statement made by the accused as part of the defence nor call the constable who took the statement and introduce it through him, e.g., exculpatory statement proffered by Crown but not admitted by trial Judge on grounds wasn't voluntary. Defence tendered statement as evidence and trial judge accepted it into evidence.

H: New trial ordered because this statement should have been rejected because the practice is unsafe and without precedent. It allows an accused to put forward a concocted defence while escaping from cross-examination, securing the benefits of sworn evidence without incurring the consequences of perjury and this deprives the jury of the benefits of appraising his credibility from his demeanour.

Rex v. Frederick (1931), 57 C.C.C. 340 (B.C.C.A.)

F: Was argued that the trial Judge erred in refusing to permit the appellant to testify concerning statements made by him to the police at the police station after his arrest, as to his knowledge of the contents of a package which turned out to be marijuana. Should be a new trial because of an error in trial Judge's charge and the admission of an irrelevant newspaper into evidence. The court agreed with trial Judge in holding the statement by accused was inadmissible. “In my view the evidence wasn't admissible because it was self-serving and there was no issue expressly raised as to whether the denial of knowledge of the contents of the package had been recently concocted” per Gale, C.J.O. (*Schroeder J.A.* concurring at 287).

Regina v. Pappin (1970), 12 C.R.N.S. 287 (Ont.C.A.)

Counsel for the accused is entitled on voir dire to examine his own witness and cross-examine Crown witnesses only as to the circumstances under which the statement was made and establish that a statement was made.

Rex v. Orel (1944), 82 C.C.C. 35 (Sask.C.A.)

Regina v. Rosik (1971), 2 C.C.C. (2d) 351 (Ont.C.A.)

Regina v. Williams, ex parte Barnett (1970), 2 C.C.C. (2d) 298 (Ont.H.C.J.)

An exception which allows an accused to have an exculpatory statement entered is when it

is suggested that the accused recently concocted or fabricated his story. He may then have entered his statement to show that he told the same story earlier in order to rebut that suggestion.

Regina v. Giraldi (1975), 28 C.C.C. (2d) 248 (B.C.C.A.)

The Crown must raise the issue of recent fabrication (in cross-examination of accused usually) before accused can rebut it by tendering his own statement.

Regina v. Rosik (1970), 2 C.C.C. (2d) 351 (Ont.C.A.)

Function of the Judge and Jury

The question whether a confession is free and voluntary is for the Judge (i.e., voluntariness is a question of law). The question of whether it is true is for the jury. Jury alone decides weight to be given to it.

Rex v. Rubletz (1940), 75 C.C.C. 239 (Sask.C.A.)

Rex v. Orel (1944), 82 C.C.C. 35 (Sask.C.A.)

Rex v. McLaren (1949), 93 C.C.C. 296 (Alta.C.A.)

Voir Dire on Exculpatory and Inculpatory Statements

An inculpatory fact is one which incriminates the accused. An exculpatory fact is one which tends to prove him innocent of the crime with which he is charged. The law concerning admissibility of statements to persons in authority is the same for both types of statements, i.e., all statements made by an accused to persons in authority require the necessity of a voir dire to prove voluntariness.

Piche v. The Queen, [1970] 4 C.C.C. 27 (S.C.C.)

Crown Asking as to Truthfulness

On the voir dire examination, Crown may ask the accused on cross-examination whether or not the confession was true.

Rex v. Hammond (1941), 28 Cr. App. R. 84 (Eng. Ct. of Crim. App.)

DeClerq v. The Queen, [1969] 1 C.C.C. 197 (S.C.C.)

Regina v. LaPlante, [1958] O.W.N. 80 (Ont.C.A.)

An accused's admission on the voir dire as to the truthfulness is not admissible on the trial proper if tendered in chief by the Crown but semble is admissible in cross-examination of an accused if he also testifies on the trial proper.

Regina v. Magdish et al. (1978), 41 C.C.C. (2d) 449 (Ont.H.C.J.)

Contents of Statement

The Judge in deciding the voluntariness of the statement should consider all the evidence relating to the circumstances which may include the contents of the statement itself since the contents may contain evidence on the issue of voluntariness.

Regina v. Reynolds, [1950] 1 K.B. 606 at 608 (Eng. Ct. of Crim. App.)

Regina v. Fex (1973), 12 C.C.C. (2d) 239 (Ont.S.C.)

The trial Judge should consider the contents of the statement on the voir dire.

Regina v. Palomba (no. 2) (1974), 17 C.C.C. (2d) 394 (Que.Q.B.)

Regina v. Robert, [1969] 3 C.C.C. 165 (B.C.C.A.)

Reid v. The Queen (1975), 20 C.C.C. (2d) 257 (Court Martial Appeal Court)

Cross-examination of Accused as to Record

If accused testifies on voir dire, he may be cross-examined on his criminal record.

Regina v. Bell (1959), 30 C.R. 60 (B.C.S.C.)

Rule as to Voluntariness Applies to Provincial Prosecutions

The rule which requires the Crown to prove that a confession by an accused has been voluntarily made is equally applicable where accused has been charged with breach of a provincial statute, e.g., **Liquor Control Act (Ont.)**.

Rex v. Vanleishout (1943), 80 C.C.C. 361 (Ont. Co.Ct.)

The Warning (Police Caution)

The warning is given to remove any apprehension and to advise a suspect of his right to remain silent. It ought to be given at the point where an officer has reasonable and probable grounds to believe the suspect has committed an offence and should be arrested. A warning to a person arrested is not a prerequisite to the admissibility of that statement. The warning is only one factor in determining voluntariness and therefore admissibility.

Boudreau v. The King (1949), 79 C.C.C. 221 (S.C.C.) overruling *Gach v. King*.

The Queen v. Fitton (1956), 116 C.C.C. 1 (S.C.C.)

Dupuis v. The Queen (1952), 104 C.C.C. 290 (S.C.C.)

Regina v. Turvey (1971), 2 C.C.C. (2d) 401 (N.S.C.A.)

Regina v. Allen (1954), 108 C.C.C. 102 (Sask.C.A.)

Regina v. DeClerq, [1966] 1 O.R. 674 (Ont.C.A.)

It may be that the **Charter** will have some effect on this particular issue. It is submitted that such statements should be admissible unless the circumstances were so outrageous as to “bring the administration of justice into disrepute” (section 24(2) of the **Charter** and cases decided thereunder).

Inducements

Confessions which result from spiritual exhortations or appeals to conscience and morality are admissible in evidence, whether urged by a person in authority or by someone else.

R. v. Gilham (1828), 168 E.R. 1235 (Eng. Ct. of Crim. App.)

R. v. Wild (1835), 168 E.R. 1341 (Eng. Ct. of Crim. App.)

An inducement by a person in authority must be as to some earthly advantage in the proceedings to be objectionable; e.g., “you had better tell the truth” is bad — have acquired a technical significance.

R. v. Jarvis, [1867] 1 C.C.R. 96.

An inducement to another person with the expectation that it will be and is in fact communicated to the prisoner renders statement inadmissible.

R. v. Thompson, [1893] 2 Q.B. 12 (Crown Cases Reserved)

A fear of prejudice or hope of advantage only renders a statement inadmissible if the fear or hope was held out by a person in authority. A self-induced hope or fear does not render the statement inadmissible.

Regina v. Dormandy (May 15, 1980), 4 W.C.B. 477 (Ont.H.C.)

Threats or Intimidation

They can take a form other than words. The court must look at all the circumstances surrounding the taking of the statement to determine admissibility.

Regina v. Loque, [1969] 2 C.C.C. 346 (Ont.C.A.)

Fear of Prejudice

The fear of prejudice means a fear of prejudice engendered or executed by a person in authority. It does not mean a fear engendered by arrest, being charged with a crime, and perhaps in addition, having a guilty conscience. It is a fear of reprisal if he fails to give a statement.

Rex v. Ibrahim, [1914] A.C. 599 (P.C.)

Regina v. Sim (1954), 108 C.C.C. 380 (Alta.S.C.)

Rex v. Gutschmidt (1939), 72 C.C.C. 128 (Sask.C.A.)

Rothman v. The Queen (1981), 59 C.C.C. (2d) 30 (S.C.C.)

The emotional effects resulting from an arrest and custody affect only weight — not admissibility.

Regina v. Chow (1978), 43 C.C.C. (2d) 215 (B.C.C.A.)

Statements Obtained by Trickery

A statement obtained by trickery is admissible if otherwise voluntarily made unless the trick is such as to bring the administration of justice into disrepute. For examples of subterfuge that might cause a statement to be ruled inadmissible on this basis see the judgment of Lamer, J. in **Rothman v. The Queen** at pp. 74-76.

Rothman v. The Queen (1981), 59 C.C.C. (2d) 30 (S.C.C.)

Rex v. McLeod (1908), 15 C.C.C. 30 (Ont.C.A.)

Regina v. Robertson (1975), 21 C.C.C. (2d) 385 (Ont.C.A.)

Regina v. Alward and Mooney (1977), 35 C.C.C. (2d) 392 (S.C.C.)

Defendant's State of Mind

Among the factors that will be considered in determining the issue of voluntariness will be the presence of mental disorders. The fact that the defendant was suffering from some type of mental disorder will not render the statement inadmissible. The test is whether the statement otherwise voluntarily given is the utterance of an "operating mind".

Ward v. The Queen (1979), 44 C.C.C. (2d) 498 (S.C.C.)

Nagotcha v. The Queen (1980), 51 C.C.C. (2d) 353 (S.C.C.)

Rex v. Sampson (1934), 62 C.C.C. 49 (N.S.C.A.)

An insane accused may give a voluntary statement.

Regina v. Santinon (1973), 11 C.C.C. (2d) 121 (B.C.C.A.)

Language Difficulties

A confession is not rendered inadmissible simply because it was taken in English which is not the accused's native tongue, where it was shown that the accused understood English fairly well and the statement was read over and explained in the accused's native tongue.

Rex v. Iwanchuk (1928), 50 C.C.C. 405 (Alta.C.A.)

Statements given in one language by accused fluent in another goes only to the accuracy or weight of the statement — not its admissibility.

Regina v. Lapointe and Sicotte (1983), Unreported (Ont.C.A.)

Statements Made Under Statutory Compulsion

Statements which are required under some statutory provision, e.g., sections 173 or 174 of H.T.A., are subject to the same rules of admissibility as other statements.

Regina v. Fex (1973), 14 C.C.C. (2d) 188 (Ont.C.A.)

Person in Authority

Is a person engaged in the arrest, detention or prosecution of the accused. “A person in authority means one who had some opportunity of influencing the cause of the prosecution”, (and accused believes this).

Kenny’s Outline of Criminal Law (15th ed.) at p. 470.

Tremear’s Criminal Code (5th ed.)

The test as to whether someone is a person in authority is subjective, i.e., whether the accused himself perceived the person as such, not whether he is actually in such a position.

Rothman v. The Queen (1981), 59 C.C.C. (2d) 30 (S.C.C.)

Police officers are the persons in authority most often encountered in prosecutions but other persons may fall into this category. Some of the persons who have been held to be persons in authority are:

1. An employer on a charge of theft from that employer.
Rimmer v. The Queen (1969), 7 C.R.N.S. 361 (B.C.C.A.)
2. Victim when accused in police custody and when taken to victim by police.
Regina v. Downey (1976), 32 C.C.C. (2d) 511 (N.S.C.A.)
3. A psychiatrist in charge of hospital to which accused had been remanded for a psychiatric examination.
Regina v. Conkie (1978), 39 C.C.C. (2d) 408 (Alta.C.A.)

Some persons found not to be persons in authority are:

1. Doctors who have treated the accused and assumed no authority over accused.
Rex v. Roadhouse (1933), 61 C.C.C. 191 (B.C.C.A.)
Regina v. Johnston, [1965] 3 C.C.C. 42 (Man.C.A.)
Regina v. MacKenzie, [1965] 3 C.C.C. 6 (Alta.C.A.)
Regina v. Lafrance (1972), 19 C.R.N.S. 80 (Ont.C.A.)
2. Police informants placed in cells with accused.
Regina v. Towler, [1969] 2 C.C.C. 335 (B.C.C.A.)
Regina v. Pettipiece (1972), 18 C.R.N.S. 236 (B.C.C.A.)
Regina v. Rothman (1979), 42 C.C.C. (2d) 377 (Ont.C.A.), affirmed (1981), 59 C.C.C. (2d) 30 (S.C.C.)
3. Spouse of accused.
Rex v. McLaren (1949), 7 C.R. 402 (Alta.C.A.)

Series of Statements

A voluntary statement made after an earlier inadmissible statement can be admissible if voluntary.

Regina v. Belanger (1978), 40 C.C.C. (2d) 335 (Ont.H.C.)

However, if a subsequent statement is induced by an earlier inadmissible one, the subsequent statement is also inadmissible.

Regina v. Gariepy (1978), 40 C.C.C. (2d) 345 (Que.S.C.)

Statements Made by Co-Accuseds

Unless the several accused are charged with conspiracy or a common unlawful purpose a statement is evidence only against the person making it and it is the trial Judge's duty to warn the jury in this regard.

Rex v. Martin (1905), 9 C.C.C. 371 (Ont.C.A.)

Regina v. Henaire and Bedard, [1954] O.W.N. 458.

Statements Made by Co-conspirators

In conspiracy, the acts and statements of any one conspirator are evidence against all co-conspirators for the purpose of proving the conspiracy. Both the existence of the conspiracy and the participation of the defendants in it must be proved although the order of proving each is immaterial.

R. v. Frost (1839), 173 E.R. 771 (Monmouth Special Commission)

Regina v. Provincial Magistrate, Ex parte Appel, [1970] 2 C.C.C. 182 (Man.Q.B.)

If accused persons have agreed to achieve a common unlawful purpose, the acts and declarations of each are admissible against all the others.

Koufis v. The King (1941), 76 C.C.C. 161 (S.C.C.)

Regina v. Baron and Wertman (1976), 31 C.C.C. (2d) 525 (Ont.C.A.)

Taken Down in Writing and Signed

All statements should be taken down in writing to preclude argument that it was made. If circumstances don't permit such a course, the officer(s) should make a note in their notebooks. An unsigned statement is admissible but should if possible be strengthened by other available evidence. If statement was not taken down in writing and neither officer makes a note as to the statement or the exact circumstances surrounding its taking, the trial Judge should rule whether there is some evidence fit to go to the jury that the statement was in fact made.

Regina v. Mulligan, [1955] O.R. 240 (Ont.C.A.)

Police Constables Must not Cross-examine Accused While Taking Statements

Repeated accusations of guilt, contradicting previous answers, etc., may create an aura of threats and involuntariness such as to make statement inadmissible.

Rex v. Howlett (1950), 96 C.C.C. 182 (Ont.C.A.)

Intoxicated Accused

One of the circumstances which may affect admissibility is the accused's state of mind. If the accused is very intoxicated it may affect voluntariness but as McRuer, C.J.H.C. states in **Regina v. Yensen** (1961), 130 C.C.C. 353 at 359 "I had occasion in **R. v. Washer** (1947), 92

C.C.C. 218 to take into consideration the circumstances that an accused person was, at the time the statement was taken, considerably under the influence of liquor. I want to make it perfectly clear that I had no intention, in what I said in that case, of laying down as a rule of law that because a man was in some degree under the influence of liquor he could not make a voluntary statement. Many men make very compelling speeches, both privately and publicly when they are under the influence of liquor”.

Gale J., of the Ontario Supreme Court in **Regina v. Petersen** (1956), 114 C.C.C. 366 disagreed with **Washer**, holding that capacity went to weight, not admissibility.

See also *Regina v. Oldham* (1971), 1 C.C.C. (2d) 141 (B.C.C.A.) re this.

See also *McKenna v. The Queen*, [1961] S.C.R. 660 (S.C.C.)

See also *Regina v. Hartridge* (1966), 48 C.R. 389 (Sask.C.A.) wherein breath readings of 2.3 were considered.

See also *Regina v. Lapointe and Sicotte* (1983), Unreported (Ont.C.A.)

Statements by Others Made in Presence of Accused and Accepted by Him

A statement made by someone other than the defendant may be used in evidence if it is adopted by the defendant. This adoption may be either express or by implication. An example of an implicit adoption would be when the defendant does not assert his innocence when accused of having committed an offence, and the natural reaction of an innocent person would have been to do so.

Rex v. Dimetro and Mitchell (1945), 85 C.C.C. 135 (Ont.C.A.)

However, all the circumstances must be examined; if the defendant is under arrest, it can no longer be said that by remaining silent (as is his right), that he is adopting the statement.

Regina v. Eden, [1970] 2 O.R. 161 (Ont.C.A.)

Some examples of statements made by another in the presence of an accused are:

1. F: Leading case — Constable gave evidence that complainant within hearing of accused, pointed out accused and said, “That is the man.” Constable asked “What did he do?” and complainant described offence. Accused replied “I am innocent”.
 H: The statement of complainant is admissible as accepted by accused by his own words, actions and demeanour. Prosecution should lay a foundation from which jury could infer the accused accepted the statement in whole or in part.
Rex v. Christie, [1914] A.C. 545 (House of Lords).
2. F: When accused was arrested, a police officer read the charge re indecent assault to him. He was asked if he would give a statement and accused replied “you got it all there — there is nothing more to say”. Issues on appeal were whether this oral statement was admissible and if it was corroborative of complainant’s evidence.
 H: The accused’s words were admissible because was spontaneous, not in answer to leading questions, no threats or promises made. The words were capable of being corroboration of complainant’s story.
Regina v. Fagnoli, [1957] O.R. 140 (Ont.C.A.)

The adoption of the statement may be done by silence on the part of the accused. The rationale is that when a person is accused and does nothing, there is some evidence that the accusation is true.

3. F: Police went to home of accused, confronted him with findings (of bag found with 50

heroin capsules) advised him had been under surveillance and cautioned him. He remained silent. Accused had lengthy criminal record.

H: Accused's silence cannot be held against him here because he was specifically told he was under no obligation to say anything.

Regina v. Cripps, [1968] 3 C.C.C. 323 (B.C.C.A.)

4. F: Accused was with three companions when a scuffle ensued during which complainant was stabbed with knife. During scuffle one of accused's companions pointed to accused and said, "don't fight him, he's got a knife . . . we don't want any trouble". Complainant stated to accused, "Put your knife away and come out to front". Accused did nothing and made no reply to these remarks. Was argued on appeal that these statements were not admissible because weren't made by complainant/victim.

H: Statements of third party (accused's companion) were admissible as accepted by accused. The principle does not depend on the relationship of the person who spoke the words but rather on the circumstances in which that person spoke and the response, if any, by the accused.

Regina v. Hammond, [1970] 2 C.C.C. 140 (Ont.C.A.)

5. F: Accused was in a stolen car with three others and were stopped by police after a chase. The three were arrested, put in rear seat of police cruiser and questioned. The questions were put mainly to the other two and police could not recall accused saying anything or which of three made an incriminating statement.

H: The incriminating statement is not admissible against accused because was no positive identity who made the statement in accused's presence and it can't be assumed that the natural reaction for an accused under arrest in a police cruiser would be to deny the statement or assert his innocence. N.B. Case turned on fact that was no positive evidence that accused failed to protest, circumstances were coercive, accused had alibi, and insufficient evidence of accused's taking automobile.

Regina v. Eden, [1970] 2 O.R. 161 (Ont.C.A.)

6. F: Accused fondled complainant in gypsy parlour with her hand in vicinity of wallet. Wallet was missing and police called. Another gypsy upstairs in presence of accused yelled down "leave girls alone and I'll give you the money back". Accused denied taking money.

H: This statement by a third person in presence of accused is admissible and an acknowledgement of guilt might be inferred from all the circumstances because there were circumstances calling for repudiation and was none.

Rex v. Dimetro and Mitchell (1945), 85 C.C.C. 135 (Ont.C.A.)

Crown Can Hold Back Statement Until Cross-examination of Accused

Where a statement made by accused to the police is of doubtful important relevance to the Crown's case and the Crown chooses not to have a voir dire in respect of that statement nor to seek to have it introduced as part of the Crown's case, Crown can introduce it during case for defence after a voir dire. This evidence goes to credibility of accused and defence may insist on other portions of statement being put in if Crown intends to cross-examine only upon a portion. One case suggests that in certain circumstances the Crown may even introduce statement for first time during Crown's rebuttal if a voir dire is held. The following cases clearly establish that Crown after a voir dire can use statement during defence case to test credibility of the accused.

The issue of Crown splitting its case does not arise because statement is being introduced solely on issue of credibility and not as evidence on main issues at all, so is no holding back by Crown.

Regina v. Drake (1971), 1 C.C.C. (2d) 396 (Sask.Q.B.)

Regina v. Ament (1972), 7 C.C.C. (2d) 83 (Ont.H.C.J.)

Regina v. Ryckman (1972), 19 C.R.N.S. 14 (Ont.S.C., Donnelly J.)

The Crown may establish voluntariness of the statement and then not put the statement into evidence until cross-examination of accused.

Regina v. Adams et al. (1956), 117 C.C.C. 93 (N.S.S.C.)

Regina v. Black and Mackie, [1966] 3 C.C.C. 187 (Ont.C.A.)

Regina v. Lizotte (1980), 18 C.R. (3d) 364 (Que.C.A.)

Regina v. Pappajohn, [1979] 5 C.C.C. 193 (B.C.C.A.)

The statement cannot be tendered for the first time in rebuttal if it deals with central issue in the case.

Regina v. Bruno (1975), 27 C.C.C. (2d) 318 (Ont.C.A.)

Confirmation by Subsequent Facts

It is now accepted in Canada “the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained”.

Per Goddard C.J. in Kuruma v. The Queen, [1955] A.C. 197 at 203 cited with approval by the Supreme Court of Canada in Regina v. Wray, [1971] S.C.R. 272.

There are strict limits to the trial judge’s exclusionary discretion which in the opinion of the Supreme Court had been “unduly extended”. In fact “the exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly”.

Regina v. Wray, [1971] S.C.R. 272 at 293 per Martland J.

The function of the Courts is not to police the police nor is a trial a game and therefore evidence obtained as a result of a confession which is not admissible should be received.

The next step is that the part(s) of the statement which is confirmed by subsequent facts, inadmissible as the statement may be, will be admitted — this is the doctrine of confirmation by subsequently discovered facts. This doctrine allows the prosecution to lead evidence as to statements made by the accused which are neither free nor voluntary.

Therefore, after a confession has been ruled inadmissible, a police officer can testify, e.g., that he was directed to be taken by the accused to the scene where he found the stolen goods. Generally the exact words of the accused can be given in evidence as well as his actions in pointing out things at the scene as long as those words are confirmed by the discovery of some fact but any statements which are not so confirmed are not admissible, e.g., (1) accused pointing to tree at scene says to policeman, “The knife should be about 10 feet from that tree” — both statement and actions of accused are admissible. (2) Accused says “I was running along through the field when I threw the knife near the tree” — not admissible because finding the knife does not absolutely confirm the statement that he threw it there, someone else might have.

The foregoing requires surgery of the statement in order to ensure that the parts left do not put matters out of context.

- F: Accused in custody made a statement to police in which he gave an account of the disposing of a twitch and the deceased's wallet together with an admission that he had given a sum of money to another person with the request to lock it up for him. As a result of this statement he was taken to a point not far distant from the scene of the crime, where police found a twitch similar to one used in the stables where the accused was employed, and a wallet similar to that carried by the deceased together with a liquor permit bearing the deceased's name. It was the Crown's theory that St. Lawrence had used the twitch to beat the deceased to death, and that he subsequently robbed him.
- H: Crown could adduce proof of the facts discovered as a result of the inadmissible confession but not any accompanying statements which were not confirmed by the discovery of facts. Anything said or done by the accused which indicates that he knew where the articles in question were is admissible but it isn't permissible to adduce evidence that accused said he put the articles where they were found because finding them does not confirm this statement. "Where the discovery of the fact confirms the confession — that is, where the confession must be taken to be true by reason of the discovery of the fact — then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible" per *McRuer, C.J.H.C.* at 391.

Rex v. St. Lawrence (1949), 93 C.C.C. 376 (*McRuer, C.J.H.C.*) approved by S.C.C. in *The Queen v. Wray*, [1970] 4 C.C.C. 2 which also holds that notwithstanding the exclusion of the confession on the basis of involuntariness, the facts leading to the discovery of the murder weapon confirmed that part of the confession as being true and that part of the statement which was confirmed by the subsequent facts is admissible.

Defence Counsel's Instructions to Police

Counsel retained by accused cannot prevent police from interviewing their client by instructing police not to question the client.

"In the present case, Mr. Agnew, counsel for the accused who was first called, told the police officers not to question the accused unless he was present. Such direction, in my view, was not one which the police officers were required to follow. While counsel had every right to advise the accused to give no statement to the police, and while the accused had every right to follow that advice, counsel could not prevent the police officers from following the investigation of the alleged offence, including proper interrogation of the accused."

Regina v. Settee (1974), 22 C.C.C. (2d) 193 at 205 (Sask.C.A.)

Regina v. Dinardo (1981), 6 W.C.B. 240 (Ont.Co.Ct.)

Allegations by Defence of Improper Police Conduct

In *R. v. O'Neill and Ackers* (1950), 34 Cr. App. R. 108, the applicants for leave to appeal had made statements which were tantamount to confessions of guilt, but it was suggested to the police officers in cross-examination by defending counsel that these statements had been extracted from the appellants by threats and physical violence on the part of the police. Neither of the appellants was called to give evidence. Lord Goddard, C.J., said: "To say, as is too said, that the police threatened and pummelled and beat a prisoner to get a statement out of him is about as serious an accusation as can be made against the police. If there was any foundation for the allegation it would have to be investigated, and if it was found to be true, the police officers concerned would be dealt with both criminally and also by being dismissed from the

service. However, what the court desires to call attention to is this: having suggested this in cross-examination to the police, and having repeated the suggestion before the jury, counsel did not call his client to support what he had been instructed to say, and the court has no hesitation in saying that this is not the proper practice. It is one thing to cross-examine a witness about credit, in which case one is bound by the answer of the witness. It is quite wrong and improper conduct on the part of counsel to make a charge against the police or against any other witness by way of defence — because, if course it would have been a defence if the statements which were the principal evidence against the applicants had been extracted from them by improper means — if he does not intend to call his client to give evidence to support the charge. They did not dare to go into the box, and therefore, counsel, who knew that they were not going into the box, ought not to have made these suggestions against the police. It is one thing to cross-examine properly and temperately with regard to credit, though it is very dangerous to do so unless you have material on which to cross-examine and with which you can confront the witness. It is, however, entirely wrong to make such suggestions as were made in this case, namely that the police beat the prisoners until they made confessions, and then, when there is a chance for the prisoners to substantiate what has been said by going into the box, for counsel not to call them. The court hopes that notice will be taken of this, and that counsel will refrain, if they do not intend to call their clients, from making charges which, if true, form a defence from which, if there is nothing to support them, ought not to be pursued.”

STRICT LIABILITY

Introduction

Most public welfare offences which regulate activities in the interest of society's health and safety, such as laws concerning food, pollution, construction safety, fire prevention et cetera, are strict liability offences.

The over-all regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence is a strict liability (or absolute or a mens rea) offence. Prima facie, any provincial offence falls into the strict liability category and only clear legislative language can cause it to be classified otherwise. Even a provincial offence which contains an intentional element would probably be a strict liability offence.

Defined

"Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability."

Regina v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353 at 374 (S.C.C.)

Examples of Strict Liability Offence:

1. F: Defendant was charged with hunting ducks within a quarter mile of place where bait deposited. Defendant did not know bait was present, it was not easily visible and a reasonable person might well have been unaware of the existence of the bait.
H: The offence was one of strict liability and defendant acquitted because due diligence shown.
Regina v. Chapin (1979), 45 C.C.C. (2d) 333 (S.C.C.)
2. F: Defendant employer was charged with failing to ensure that industrial safety procedures were carried out as a result of an incident in which an employee was injured while cleaning a machine when it was in motion.
H: Defendant had satisfied onus of due diligence by taking all reasonable steps to prevent the occurrence. Defendant had advised, instructed and cautioned employee as to proper procedures. Employee acting on his own when incident occurred.
Regina v. Z-H Paper Products Ltd. (1979), 27 O.R. (2d) 570 (Ont. H.C.J. - Div. Ct.)
3. F: Accused, president of a union, was charged with participating in a strike because he, along with many other employees, failed to show up for work.
H: This offence which has an implied mental element, to wit, to cease to work in concert with others, is strict liability and defendant could negative the mental element by showing that he reasonably believed there was no strike.
Strasser v. Roberge (1979), 50 C.C.C. (2d) 129 (S.C.C.)
F: Notwithstanding the provisions of any other Act, every person who has reasonable

grounds to suspect in the course of the person's professional or official duties that a child has suffered or is suffering from abuse that may have been caused or permitted by a person who has or has had charge of the child shall forthwith report the suspected abuse to a society.

Subsection 49(2) of the **Child Welfare Act**.

H: This is a strict liability offence.

Regina v. Cook (June, 1985), unreported (Ont.C.A.)

Party to a Strict Liability Offence

A person cannot be convicted of aiding and abetting a strict liability offence unless he has actual knowledge of the facts giving rise to the offence.

Regina v. F. W. Woolworth Co. Ltd. (1974), 18 C.C.C. (2d) 23 (Ont.C.A.)

SURPLUSAGE

Introduction

Assuming that a count is valid and sufficient in that it provides reasonable information as to the offence alleged, a defendant may require additional information to meet the charge. This additional information may be supplied in the original Information or may be provided by particulars supplied by the Crown.

The issue of proof of the charge will arise at the end of the evidence when it may be argued that the Crown has failed to prove one or more of the averments in the original count, the count as amended or the particulars which become part of the Information.

Any averments which are not essential ingredients of the offence are surplusage and need not be proved.

Provincial Offences Act

See sections 26, 35, 36 and 38.

Rule

“Allegations which are not essential to constitute the offence and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof and may be rejected as surplusage”.

Archbold, Criminal Pleading Evidence and Practice (38th ed.) par. 114, page 49.

“Undoubtedly, everything which is essential to be proved by the prosecution must be alleged in the count but it does not necessarily follow that everything which is alleged must be proved. An unnecessary allegation may be treated as surplusage if the essential allegations are made and established.”

Regina v. Van Hees (1958), 27 C.R. 14 at 20, 21 (Ont.C.A.)

Examples of Surplusage:

1. The licence number of a stolen car.
Regina v. Van Hees (1958), 27 C.R. 14 (Ont.C.A.)
2. A “geiger counter” when other named items in the same count were proved to be stolen. The described items were not essence of offence.
Regina v. Kestenberg and McPherson (1959), 126 C.C.C. 387 (Ont.C.A.)
3. All the previous testimony given by an accused charged with perjury was unnecessary surplusage.
The King v. Coote (1903), 8 C.C.C. 199 (B.C.S.C.)
4. An indictment which alleged a robbery effected with a knife and a revolver was not an essential fact to be proved.
Regina v. Roberts (1981), 18 C.R. (3d) 191 (Ont.C.A.)
5. The word “resin” after cannabis was surplusage in so far as the offence of possession was concerned.
Regina v. Barrett (1980), 15 C.R. (3d) 361 (Alta.C.A.)
6. The words “making an arrest” in a charge of assault police are surplusage.
Regina v. Lowry et al. (1971), 2 C.C.C. (2d) 39 (Man.C.A.)
See also Regina v. Doiron (1960), 129 C.C.C. 283 (B.C.C.A.)
7. The words “The Water Tower Inn” in a charge of appearing in an immoral performance.
Regina v. MacLean; Regina v. Hilsinger (1981), 58 C.C.C. (2d) 318 (Ont.C.A.)
8. The licence number of the car on a charge of impaired driving was surplusage.
Regina v. Duplin (1959), 126 C.C.C. 400 (B.C.S.C.)

Wrong Section Number of Statute

The reference to the section number of the act contravened is surplusage and therefore any error in it is not a fatal defect.

- Regina ex rel. James v. Joy Oil Co. Ltd. (1959), 123 C.C.C. 370 (Ont.C.A.)
 Regina v. International Nickel Co. (1972), 8 C.C.C. (2d) 557 (Ont.H.C.J.)
 Fontaine et al. v. Dansereau J.S.P. et al. (1979), 14 C.R. (3d) 158 (Que.C.A.)
 Regina v. Sourwine (1970), 10 C.R.N.S. 380 (Alta.D.C.)

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DOG OWNER'S LIABILITY ACT

Liability of Owner

Under the former legislation (the **Vicious Dogs Act**) the owner of a dog was strictly liable regarding an action by a party attacked by the dog. In **Sgro et al. v. Verbeek** the Ont. H.C.J. held that "to establish strict liability based on the common law doctrine of scienter, it is essential to prove that the dog (an animal *mansuetae naturae*) had vicious or mischievous propensities." That dicta has been rendered obsolete by ss.2(1) and (3) of the **Dog Owner's Liability Act** which specifically exclude the requirements of scienter, fault and negligence. The result, it is submitted, is an absolute liability of the owner which may be mitigated in respect of damages awarded by the fault or negligence, if any, of the plaintiff.

Sgro et al. v. Verbeek (1980), 111 D.L.R. (3d) 479 (Ont.H.C.J.)
ss.2(1) and (3) D.O.L.A.

Proceeding Against Owner of Dog

Note that Part VIII of the **Provincial Offences Act** applies to any proceeding against the owner of a dog which has allegedly bitten or attacked a person. This would allow for appeal procedures as well.

s.4(1) D.O.L.A.

Order for Control or Destruction of Dog

After a finding of fact that the dog has bitten or attacked a person (Note: only an attack on a person is relevant) the Provincial Offences Court, if satisfied that the protection of the public requires it, may make an order under s.4(2)(a) or (b). Regarding an order for destruction s.4(3) suggests seven considerations of possible relevance to the court's decision. In **R. v. Soper**, Gratton, D.C.J. enunciated the following additional consideration, "although nowhere in the body of the **Vicious Dogs Act** is it provided that a dog must be found to be "vicious" to support an order for its destruction, where the evidence indicates that the dog was specially bred for custodial purposes, that professional observation of the dog's disposition and reactions over a lengthy period leads to the conclusion that it is not of a vicious disposition and that its victim's movements at the time of the biting were of a kind that would reasonably lead a dog of that type to attack, the destruction of the dog should not be ordered."

R. v. Soper, [1971] 1 O.R. 506 (Ont.Dist.Ct.)
ss.4(2) and (3) D.O.L.A.

Penalty

Note that the only penalty provision in this act pertains to a contravention of an order made under s.4(2).

s.4(4) D.O.L.A.

GAME AND FISH ACT

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Generally

Application on Federally Held Lands:

“The **Game Act** (R.S.N.B.) which concerns game and its conservation obviously cannot be construed as being legislation in relation to any of the classes of subjects falling within s.91 of the **B.N.A. Act** [now **Constitution Act**, 1867] and for this reason alone the **Game Act** should be held *prima facie* to have application within (Canadian Forces) Base Gagetown.” (**R. v. Hartt**).

“The **Game and Fisheries Act** — in any event such part of it as is relevant here (hunting partridge out of season without firearm permits) — is not concerned with land. Its purpose is the protection of wild game and fish, and its prohibitions are directed against persons within the province, and their conduct. . . . The mere fact that the Dominion has acquired and uses this Reserve for Dominion purposes does not remove either the land itself or the persons upon it, wholly outside provincial jurisdiction, as if it were foreign territory . . . although no doubt the Dominion Parliament could enact overriding legislation under its power to make laws in relation to militia and defences.” (**R. v. Smith**).

R. v. Hartt (1979), 45 C.C.C. (2d) 262 (N.B.S.C. App.Div.)

R. v. Smith (1942), 78 C.C.C. 48 (Ont.C.A.)

Application to Indians:

Section 88 of the **Indian Act** R.S.C., 1970, c.I-6 states: “Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province except to the extent that such laws are inconsistent with this act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.”

GAME AND FISH ACT

In **Kruger and Manuel** the S.C.C. held the two indicia as to whether or not a provincial enactment is a law of general application to be, "first, whether the enactment extends uniformly throughout the territory, and, secondly, whether it is in relation to one class of citizens in object and purpose . . . only if it could be shown that the policy of such Act was to impair the status and capacities of Indians would s.88 not operate to make the Act applicable to Indians, . . . accordingly, s.4 of the **Wildlife Act, 1966** (B.C.) (which prohibits hunting without a permit during the closed season) applies to Indians." The judgment of **Frank v. The Queen** was given the same day by the S.C.C.; the holding indicated that "pursuant to s.88 of the **Indian Act**, . . . all provincial laws of general application apply to Indians subject to the terms of any treaty and any other Act of Parliament."

Kruger and Manuel were each non-treaty Indians and their convictions were upheld. **Frank**, however, was a treaty Indian and was protected by s.12 of the **Alberta Natural Resources Transfer Agreement** and acquitted of illegal possession of wildlife.

The principles of the **Frank** case were recognized in **R. v. Atwin and Sacobie** and **R. v. Genereaux** where the New Brunswick and Saskatchewan provisions regarding hunting without a licence were held not to be applicable to treaty Indians where the treaties permitted free liberty of hunting and fishing.

Also see **R. v. Hill** (1951) where on Ont. Co. Ct. Judge held that "the provincial game laws do not apply to Indians while they are on Indian Reserves; and **R. v. Jim** (1915) where the S.C. of B.C. held "The regulation of Indian reserves being under the exclusive jurisdiction of the Dominion Parliament, a Provincial game protection law is not effective, as regards such Indian reserve, to prohibit an Indian there resident from hunting and killing a deer on the reservation for his own use; a conviction under the **Game Protection Act**, B.C., on a charge brought against an Indian for having venison in his possession without a permit, was therefore quashed."

The above cases are distinguishable from the military reserve cases (**R. v. Hartt** and **R. v. Smith** supra) because of the application of the treaty paramountcy principles in the **Indian Act**. Where no treaty is in effect, however, Indians are subject to the provincial laws and s.88 of the **Indian Act** has no application. Thus "Indians hunting off a reserve in Nova Scotia were required to hold a hunting licence under the **Lands and Forests Act**" (**R. v. Paul and Copage**). Also "lands designated as game preserves ceased to be unoccupied Crown lands and treaty Indians were bound by the provisions of the **Game Act** prohibiting hunting thereon (**R. v. Nippi**).

In **R. v. Jack and Charlie** the accused were charged with hunting out of season. They had shot a deer for use in a religious ceremony. The validity of this ceremony was affirmed by expert evidence. "The accused argued that application of the **Wildlife Act** in the circumstances constituted a denial of freedom of religion and also interfered with the freedom of the Salish people to practise their religious belief so as to affect their capacity as Indians."

The B.C.C.A. in applying the **Kruger and Manuel** test held: The **Wildlife Act** (B.C.) is an Act of general application in the province validly enacted by the Legislature and applicable to Indians. While freedom of religion is a fundamental right that freedom must be exercised in accordance with the general law. The **Wildlife Act** does not conflict with any federal legislation nor does it have as one of its purposes the regulation or restricting of freedom of religion. It must be construed by reference to its language, which makes it clear that what was intended is the regulation of hunting so that wildlife will be protected. Further, while it may be that there is an exception to the applicability to Indians of provincial laws of general application in the province where the legislation impairs the capacity of Indian people, the legislation in this case did

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not have that effect. The accused had not shown that the policy of the **Wildlife Act** was to impair the capacity of Indians to practise their religion.

Kruger and Manual v. The Queen (1977), 34 C.C.C. (2d) 377 (S.C.C.)

Frank v. The Queen (1977), 34 C.C.C. (2d) 209 (S.C.C.)

R. v. Atwin and Sacobie, [1981] 2 C.N.L.R. 99 (N.B. Prov.Ct.)

R. v. Genereaux, [1982] 3 C.N.L.R. 95 (Sask. Prov.Ct.)

R. v. Hill, [1951] O.W.N. 824, 101 C.C.C. 343 (Ont.Co.Ct.)

R. v. Jim (1915), 26 C.C.C. 236; 22 B.C.R. 106 (B.C.S.C.)

R. v. Paul and Copage (1977), 24 N.S.R. (2d) 313 (N.S.C.A.)

R. v. Nippi (1969), 70 W.W.R. 390 (Sask.Dist.Ct.)

R. v. Jack and Charlie (1982), 67 C.C.C. (2d) 289 (B.C.C.A.)

The Canadian Encyclopedic Digest (Ontario):

The C.E.D. (Ont.) thoroughly canvasses the issue regarding application of the **F.G.A.** to Native People in 13 C.E.D. (Ont. 3rd.) title 64-Fish and Game paragraphs 39-43 (with the 1984 Supplement). The following cases are listed regarding the issue of "whether or not Indians hunting off the reserve are immune from prosecution under provincial game laws, **R. v. Julian** (1978), 26 N.S.R. (2d) 156 (C.A.) (accused Indian wounding deer on reserve and finding it dead after trailing it off reserve; accused subject to **Lands and Forests Act**, R.S.N.S. 1967, c. 163 while off reserve and convicted); **R. v. Kruger**, [1975] 5 W.W.R. 167; affirmed [1977] 4 W.W.R. 300 (S.C.C.); **R. v. Paul** (1977), 24 N.S.R. (2d) 313 (C.A.); **R. v. Jacques** (1978), 20 N.B.R. (2d) 576 (Prov.Ct.); **R. v. Budd**; **R. v. Carne**, [1979] 6 W.W.R. 450 (Sask.Q.B.)(s.8(1) of **Game Act**, 1967 (Sask.), c. 78 exempting Indians from certain hunting restrictions; non-treaty Indians not included in exemption); **R. v. Sutherland** (1979), 45 C.C.C. (2d) 538 (Man.C.A.) (s.49 of **Wildlife Act**, R.S.N. 1970, c.W-140 (unconstitutional as singling out Indians and taking away unilaterally certain rights given by federal, provincial and Imperial parliaments); **R. v. Two Young Men** (1979), 10 Alta. L.R. (2d) 15 (Dist.Ct.)(no right to hunt on occupied land; application of **Wildlife Act**, R.S.A. 1970, c.391); **R. v. Paul** (1980), 30 N.B.R. (2d) 449 and 545 (C.A.) (taking skin of lawfully killed animal off reserve to sell not contravention of **Game Act**, R.S.N.B. 1973, c. G-1); **R. v. Haines**, [1981] 6 W.W.R. 664 (C.A.) (provincial Act requiring permit for hunting out of season; aboriginal rights not substantiated by evidence; policy of legislation not impairing status or capacity of Indians; Indians not exempt from provincial legislation); **Baker Lake v. Minister of Indian Affairs & Nor. Dev.**, [1980] 1 F.C 518 (federal legislation abridging aboriginal rights to extent inconsistent with legislation); **R. v. Mousseau**, [1980] 4 W.W.R. 24 (S.C.C.)(Indian properly convicted of hunting deer on public highway during closed season); **R. v. Moosehunter** (1981), 9 Sask. R. 149 (S.C.C.)(Indians having right to hunt, trap and fish for food by agreement between Canada and Province of Saskatchewan; right dependent on whether land unoccupied Crown land or land to which Indians have right to access; wildlife management unit subject to right of access); **R. v. Standingwater**, [1981] 3 W.W.R. 553 (Sask.Dist.Ct.) (Natural Resources agreement giving Indians right to hunt on lands to which they have right to access not applying to allow hunting on road; acquittal at trial set aside and conviction entered); **R. v. Perley** (1980), 33 N.B.R. (2d) 231; affirmed 34 N.B.R. (2d) 632 (Q.B.) (applicability of **Fisheries Act** and Regulations to treaty Indians fishing in contravention thereto); **R. v. Taylor** (1979), 55 C.C.C. (2d) 172 (Ont. Div. Ct.)(provincial laws dealing with hunting and fishing not applying to Indians because of **Royal Proclamation** of 1763 which preserved such Indian rights; treaty of 1923 signed by Mississauga Tribe, however, possibly extinguishing all fishing, hunting and trapping rights of Indians throughout Ontario; validity of treaty questionable; matter referred back for new trial dealing with effect of 1923

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treaty); **R. v. Tobacco**, [1981] 1 W.W.R. 545 (Sask.C.A.) (hunting on privately-owned land; Indians exempt from ordinary game laws)."

Regarding the application of specific terms of any treaty (s.88 of the **Indian Act** supra) the C.E.D. cites the following cases, "**R. v. Perley** (1980), 33 N.B.R. (2d) 231; affirmed (1981), 34 N.B.R. (2d) 632 (Q.B.)(applicability of **Fisheries Act** and Regulations to treaty Indians fishing in contravention thereto); **R. v. Fiddler**, [1980] 6 W.W.R. 5 (Sask.Prov.Ct.) (section of **Wildlife Act** prohibiting possession of loaded firearm in motor vehicle); purpose to ensure safety and not to restrict Indian hunting rights; applicable to treaty Indians hunting for food on unoccupied Crown lands); **R. v. Taylor** (1979), 55 C.C.C. (2d) 172; affirmed (1981), 62 C.C.C. (2d) 227 (Ont.C.A.) (accused Indians being members of Mississauga Tribe; charged with taking bullfrogs during closed season; provincial laws dealing with hunting and fishing not applying to Indians because of **Royal Proclamation** of 1763 which preserved such Indian rights; treaty of 1923 signed by Mississauga Tribe, however, possibly extinguishing all fishing, hunting and trapping rights of Indians throughout Ontario; validity of treaty questionable; matter referred back for new trial dealing with effect of 1923 treaty); **R. v. Jack**, [1982] 5 W.W.R. 193, 67 C.C.C. (2d) 289 (B.C.C.A.) (violating **Wildlife Act** of British Columbia; not excepted from application of Act; right to freedom of religion to be exercised within limits permitted by validly enacted legislation); **R. v. Simon** (1982), 49 N.S.R. (2d) 566 (C.A.) (treaty of 1752 not granting immunity to accused; validity of treaty doubtful; accused failing to establish connection by descent with original group of Indians with whom treaty made); **R. v. Curley**, [1982] 2 C.N.L.R. 171 (N.W.T.Terr. Ct.)(Parliament entitled to abridge aboriginal right of Inuit to hunt and fish; ordinance preventing defendant from acquiring property rights in carcass; **Bill of Rights** inapplicable; furthermore, if such rights established, s. 1(a) of **Bill of Rights** not rendering s.40(2) of **Wildlife Ordinance** inoperative)." Also see **R. v. Moses**, [1970] 3 O.R. 314 (Ont.Dist.Ct.).

For further reference the relevant sections of the C.E.D. (supra) are recommended.

Definition of "Hunting"

As a general guide the holding in **R. v. Oberlander** that "the word 'hunt' in its natural sense means to pursue, to shoot at, or at least to do something more than look for" does not apply to the Ontario legislation. Section 1 par. 17 clearly prohibits "hunting for" game for future kill. The distinction may be valid however in the sense used in **R. v. Huskins** where 'hunting for' a bird after sunset which had been killed before sunset was held not to offend the hunting at night proscriptions of the **Migratory Birds Act** R.S.C. 1952, c.179.

R. v. Oberlander (1910), 15 B.C.R. 1314, 16 C.C.C. 244 (B.C.S.C.)

R. v. Huskins (1960), 32 C.R. 276 (N.S. Mag.Ct.)

-s.1 para. 17 G.F.A.

Definition of Resident

" 'Resident' means a person who has actually resided in Ontario for a period of at least seven (consecutive calendar) months during the twelve months immediately preceding the time that his residence becomes material under this Act." [s.(1) para. 33, **F.G.A.**] The reference to seven months in s.(1) para. 33 "requires that the period be seven consecutive calendar months as defined in the **Interpretation Act** (Ont.)."

R. v. Richard Edwardson (1982), 8 W.C.B. 64 (Ont.C.A.)

-s.1 para. 33 G.F.A.

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Obstructing Officers

The “equivalent” section of the Nova Scotia legislation states “Any person who obstructs or interferes with any warden or constable in the discharge of any duty under . . . [Part. III] shall be guilty of a violation . . .”. Part III of the Act deals with the regulation of hunting, protection of game, control of firearms in game areas and the establishment of game sanctuaries.”

Regarding the issue of constitutionality the N.S.C.A. held that “the breach of provincial game laws is not a criminal act, and the fact that the enforcement of the provincial legislation is delegated to a person who is also a peace officer does not render the legislation invalid even though the peace officer might lay a charge under s. 118 of the **Criminal Code** for obstructing him in his duties if he could establish that the duty obstructed was one which fell within the duties of a peace officer. Further, the offence under the **Criminal Code** is one of wilful obstruction whereas under s.205 the accused need only “interfere” with any warden. Accordingly, s.205 is intra vires the Province.”

R. v. Robar (1980), 56 C.C.C. (2d) 65 (N.S.C.A.); affirmed (1982), 68 C.C.C. (2d) 448 (S.C.C.)
-s.13 G.F.A.

Careless Hunting

In considering the comparable N.S. legislation, O’Hearn, C.C.J. drew an analogy between careless hunting and careless driving. He stated, “that this offence may be committed by mere inadvertence without any recklessness, wantonness or wilfulness, any intention to cause harm or to scare anybody or to, in popular expression, play the fool with a gun” (**R. v. Howard**).

The constitutionality of careless hunting was considered by the N.B.C.A. as follows: “Section 50 of the **Fish and Wildlife Act** of New Brunswick, which makes it an offence of careless hunting to handle or cause the discharge of a firearm without due care and attention, is intra vires of the provincial legislature as a local or private matter under s.92(16) of the **Constitution Act**, or a matter of property and civil rights under s.92(13) of the **Constitution Act**, because it is directed at safeguarding persons and property from the activities of those engaged in hunting. The section is not rendered inoperative by virtue of s.84(2) of the **Criminal Code** which makes it an offence to handle a firearm in a careless manner. Although there is no significant difference between the acts prohibited by the two sections, there is no operational conflict in the sense that compliance with one law involves breach of the other. The two provisions can therefore operate concurrently” (**R. v. Chiasson**).

R. v. Howard (1966), 9 C.R.L.Q. 105 (N.S.Co.Ct.)

R. v. Chiasson (1982), 27 C.R. (3d) 361, 66 C.C.C. (2d) 195 (N.B.C.A.); affirmed (1984), 11 C.C.C. (3d) 385 (S.C.C.)

-s.19 G.F.A.

Hunting from Aircraft

In considering the constitutionality of the Saskatchewan legislation prohibiting the use of aircraft in hunting game the Sask. C.A. stated, “section 30 of the **Game Act, 1967** (Sask.), c.78, s.4(a) of Sask. Reg. 162/75 made pursuant thereto which prohibit the use of aircraft for the purpose of searching for, hunting or killing game except as a means of transportation to a hunting area, are intra vires the Legislature. The true intent and purpose of the legislation is to protect game and to regulate hunting, matters within the jurisdiction of the Legislature, and there is no encroachment on Parliament’s exclusive jurisdiction over aeronautics” (**R. v. Pearsall**).

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Note the definition of “hunting” in s.1 para. 17 includes “searching for”. In **R. v. Hanaway and Lamaga** the accused used an aircraft to spot moose from the air then land at the closest spot available such that the hunters who hired them had access to the moose. The hunters were “under-cover” conservation officers.

Held: Conviction upheld, such actions fell within the acts proscribed by s.20(1) when the expanded definition of “hunting” was applied. Kinsman D.C.J. also held, in obiter, that the offence was one of strict liability.

R. v. Pearsall (1977), 37 C.C.C. (2d) 414, [1978] 5 W.W.R. 298 (Sask.C.A.)

R. v. Hanaway and Lamaga (1980), 63 C.C.C. (2d) 44 (Ont. Dist. Ct.); leave to appeal to Div. Ct. refused (1981), 63 C.C.C. (2d) 44 (Ont.Div.Ct.)

-s.20(1) G.F.A.

Night Hunting

Note the annotation to definition of “HUNTING”, s.(1) para. 17. That definition pertains to prey that will “be then or subsequently captured, injured or killed, . . .”. Presumably the holding in **R. v. Huskins** that hunting at night for prey that was shot during the day is not offensive would therefore apply to s. 22(2).

R. v. Huskins (1960), 32 C.R. 276 (N.S.Mag.Ct.)

-s.22(2) G.F.A.

Hunting, Use of Lights

The **Fish and Wildlife Act**, S.N.B. 1980, c.F-14.1 proscribes, in s.33(1)(b), the offence of hunting . . . “by means of or with the assistance of a light or lights, . . .”. s.109 of that Act indicates a reverse onus attached to any person in possession of (a) a firearm and (b) a light capable of or being used to attract or locate wildlife. Such person must “prove that he did not commit the offence charged.” A N.B. Prov. Ct. held that the s.109 reverse onus clause was unconstitutional as it offended s.11(d) of the **Charter (R. v. St. Pierre and Thibault)**.

Note that the Ontario legislation has no such onus. Also note the wording of s.22(3), “no person shall use, while hunting, any device capable of throwing or casting rays of light on any object.” It would appear that it is not necessary to hunt “by means of or with the assistance of a light”, but merely to hunt while possessing a light which is activated for any purpose.

Note also the evidence provisions in s.90(b) regarding “possession of a gun, . . . in or near a place that game inhabits or game is usually found is prima facie proof that the person in possession of it was hunting . . .”

R. v. St. Pierre and Thibault (1983), 45 N.B.R. (2d) 435 (N.B.Prov.Ct.)

-s.22(3) G.F.A.

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Hunting in Provincial Parks

Treaty Indians are bound by the provisions of the **Game Act**, R.S.S. 1965, c.356 prohibiting hunting on lands designated as game preserves.

R. v. Nippi (1969), 70 W.W.R. 390 (Sask. Dist. Ct.)
-s.26(1) G.F.A.

Weapons in Provincial Parks

After holding that the N.S. legislation prohibiting "possession of an unsealed weapon in a park" was a strict liability offence Carver P.C.J. stated, "being a strict liability offence, it is then open to the defendant to show by preponderance of evidence that he took all the care which a reasonable man would have been expected to take under these circumstances. It is not enough to show that he made an honest mistake of fact but same must be based on reasonable grounds." The honest mistake in that case was the erroneous assumption made by the accused that he was walking outside the boundary of the park. The boundary was clearly signed and he was in fact inside the park.

R. v. Lace (1981), 45 N.S.R. (2d) 466 (N.S. Prov. Ct.)
-s.26(2) G.F.A.

Licences

Hunting without a licence contrary to s.152(1) of the **Lands and Forests Act**, R.S.N.S. 1967, c.163 is an offence of strict liability of which mens rea is not an ingredient (**R. v. Paul and Copage**).

For application regarding Indians see annotation, Generally; Application to Indians.
R. v. Paul and Copage (1977), 24 N.S.R. (2d) 313 (N.S.C.A.)
-s.36 G.F.A.

Interference with Traps

This offence was held to be one of strict liability as it appears in s.28(1) of the **Yukon Game Ordinance**. Where the accused was the operator of a cat train and having obtained a land use permit from the Government and, having notified all the trappers of his intention to do so, proceeded to take his train on a wilderness road and in so doing damaged some of those traps which had not been removed.

Held: "The court was left to consider the special circumstances to determine the degree of care having regard to the gravity of potential harm from the accused's conduct; the alternatives available to him; the likelihood of harm; the degree of knowledge or skill expected of the accused; and the extent to which underlying causes of the offence were beyond the control of the accused. All the evidence in this case indicated that the accused exercised reasonable care by notifying trappers beforehand and attempting to minimize any damage once he realized all the traps had not been moved."

R. v. Gonder (1981), 62 C.C.C. (2d) 326 (Yukon Territorial Ct.)
-s.63 G.F.A.

GAME AND FISH ACT

No Traffic in Certain Fish

Regarding an application of the evidence provisions of s.90(a) to this particular section see annotations re: EVIDENCE s.90(a).

-s.72(2) G.F.A.

Dogs Running at Large

Note that this section provides civil immunity to an officer who shoots on sight “a dog running deer, elk, moose or bear during the closed season, . . .” in a “locality that deer, elk, moose or bear usually inhabit or in which they or any of them are usually found.”

In **Yarrow v. Buie** it was held that no such immunity attached to an officer who shot a dog that was running loose in an area which although not frequented by deer was at the time in question populated by at least one deer (evidence of tracks and droppings). The Co. Ct. Judge stated “it is not enough that they may be found in the locality; they must usually be found there. The evidence satisfies me that their appearance was unusual.”

Yarrow v. Buie, [1950] O.W.N. 553 (Ont.Co.Ct.)

-s.80(1) G.F.A.

Transport of Fish or Game Illegally Taken

Section 68(1)(c) of the **Game and Fisheries Act**, R.S.O. 1950, c.153 was held to proscribe a mens rea offence in **R. v. Laverge**. In that case a taxi driver was engaged by certain persons to transport them. These persons placed parcels of moose meat in the trunk of the taxi. The driver had no knowledge of the contents of those packages. He was acquitted on appeal. The wording of the 1950 legislation, although different in text, is similar in content to the current provisions.

R. v. Laverge, [1951] O.W.N. 617, 100 C.C.C. 265 (Ont.Dist.Ct.)

-s.83(2) G.F.A.

Evidence

In considering a charge of trafficking in certain fish Lunney, P.C.J. held: “This prosecution is not one of those contemplated by s.81(a) [now s.90(a)] of the **Game and Fish Act, 1961-62**. Neither the possession, taking, killing nor procuring of fish is an ingredient of the charge. The offence of being concerned in the sale of fish contrary to s.64(2) [now s.72(2)] could be committed without any of these things being proved against the accused. For instance a go-between who brings a buyer and seller together in a transaction prohibited by s.64(2) [now s.72(2)] could be properly charged and convicted of an offence under this section. This prosecution is simply not “in respect of taking, killing, procuring or possessing fish”. Evidence of one or more of these acts might be adduced in a prosecution on a charge of being concerned in the sale of fish contrary to s.64(2) [now s.72(2)] but that still would not make the prosecution a prosecution in respect of these matters, it would still be a prosecution in respect of being concerned in the sale of fish, etc., as set out in s.64(2) [now s. 72(2)].

R. v. Penasse and McLeod (1971), 8 C.C.C. (2d) 569 (Ont.Prov.Ct.)

-s.90(a) G.F.A.

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ANNOTATIONS: H.T.A.

Definition of Driver

One who is steering a tank (army vehicle) which is being towed by a truck is driving a motor vehicle within the meaning of **Criminal Code**, s.285(6) [now s.233(4)]. One who consciously assumes physical control over the direction of the vehicle is therefore the driver of the vehicle within the meaning of s.221(4) [now s.233(4)] of the **Code**.

Rex v. Miller, [1944] O.W.N. 617, 82 C.C.C. 314 (Ont.Co.Ct.)

Belanger v. The Queen, [1970] S.C.R. 567, [1970] 2 C.C.C. 206, 10 C.R.N.S. 373 (S.C.C.)

-s.1(1) para. 9 H.T.A.

Definition of Highway:

A sidewalk is not within the definition of "highway" and a charge of careless driving could not be based on the act of driving on the sidewalk. [**R. v. Wall**, 1968, Ont. Mag. Ct.].

It was held by the S.C.C. that the term "highway" neither in its ordinary or popular sense nor in its extended meaning provided by s.1(1), para. 11 [now para. 14] embraces the concept of a parking-lot, particularly one adjacent to an apartment building. [**R. v. Mansour**, 1979]. The definition has, however, been slightly changed since the Mansour decision.

A road built and maintained by Ontario Hydro was held to be a highway notwithstanding that permission must first be obtained to use it and a pass issued to successful applicants; no applicant had been refused permission [**Rosentreter v. Fuerst et al.**, 1957, Ont. H.C.].

A ferry is not a highway within this section [**Van Every et al. v. Van Every et al.**, 1983, Ont. H.C.].

The cases conflict regarding roads on Indian Reserves: see **R. v. Spear Chief** [1963, Alta. Dist. Ct.] and **R. v. Sport** [1971, B.C. Co. Ct.] and compare **R. v. Johns (No. 2)** [1963, Sask. Dist. Ct.] and **R. v. Canute** [1983, B.C. Co. Ct.].

Regina v. Wall (1968), 11 Cr. L. Q. 223 (Ont.)

Regina v. Mansour, [1979] 2 S.C.R. 916, 2 M.V.R. 1, 47 C.C.C. (2d) 129, 101 D.L.R. (3d) 545, 27 N.R. 476 (S.C.C.)

Rosentreter v. Fuerst et al., [1957] O.W.N. 458, 10 D.L.R. (2d) 521 (Ont. H.C.)

Van Every et al. v. Van Every et al. (1983), 20 A.C.W.S. (2d) 199 (Ont. H.C.)

R. v. Spear Chief (1963), 45 W.W.R. 161 (Alta. Dist. Ct.)

R. v. Sport (1971), 3 C.C.C. (2d) 477 (B.C. Co. Ct.)

R. v. Johns (No. 2) (1963), 45 W.W.R. 65 (Sask. Dist. Ct.)

R. v. Canute, [1983] 5 W.W.R. 566 (B.C. Co. Ct.)

-s.1(1)(14) H.T.A.

Definition of Intersection

Note that the definition includes the intersection of a driveway with a public highway, street, avenue, etc., as these terms are each defined as a "highway". As applied to s.121(2) (improper right turn) an improper turn into a driveway from a highway should satisfy the elements of the offence.

-s.1(1)15 H.T.A.

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Definition of Motor Vehicle

Since a farm tractor is excluded from the definition, s.35 (driving while under suspension) has no application to the operator of a farm tractor. An automobile which cannot be set in motion by its own power by virtue of the fact it is stuck on a snowbank or in a ditch is still a motor vehicle within the meaning of s.2 of the **Code** for the purposes of s.234 of the **Code**.

Regina v. McKenzie, [1961] O.W.N. 344 (Dist. Ct.)

Saunders v. The Queen, [1967] S.C.R. 284, [1967], 3 C.C.C. 278, 1 C.R.N.S. 249 (S.C.C.)

-s.1(1)23 H.T.A.

Definition of Vehicle

A wheelchair is a vehicle. It would seem that a bicycle, propelled by muscular power, would be within the definition.

Carlson v. Chochinov, [1947] 1 W.W.R. 755, [1947] 2 D.L.R. 64 (Man. K.B.), affirmed [1948] 4 D.L.R. 556 (Man.C.A.)

Harper v. Assoc. Newspapers Ltd. (1927), 43 T.L.R. 331.

-s.1(1)39 H.T.A.

Permit and Number Plates Required

The “owner”, on whom rests the obligation to register a motor vehicle before operating it, is not defined in the **Ontario Highway Traffic Act**. It is submitted that this person is the registered owner unless the vehicle has been recently purchased in which case the purchaser is the owner. See also s.181(3) and s.6(1) **H.T.A.**.

-s.7(1) H.T.A.

Exceptions as to Residents of Other Provinces

Upon whom does the burden lie regarding qualifications, such as period of residency, for the exemptions in s.15? In N.B. it was held, when considering a section not totally dissimilar to s.15, that the Crown upon establishing the elements of the offence (a resident driving a vehicle registered out of province) established a prima facie case and it was up to the accused to bring himself within the exceptions.

R. v. MacCaulay (1958), 120 C.C.C. 372 (N.B. Co.Ct.)

-s.15 H.T.A.

Drive Motor Vehicle — No Licence/Improper Licence

A subsection of the Alberta legislation in this area provides a reverse onus on the accused “to show that he holds a subsisting operator’s licence”. Section 18(1) of the **Ontario H.T.A.** does not directly impose such a burden but it does state that “no person shall drive a motor vehicle on a highway unless . . . [licenced to do so].” By virtue of s.48(3) of the **P.O.A.** the burden of proving this authorization or qualification falls to the defendant. The burden is proof by a preponderance of evidence. In **R. v. Clements** [1983, Alta. Prov. Ct.] the Alberta provision was held not to contravene s.11(d) of the **Charter**. The same logic, it is submitted, applies to s.48(3) of the **P.O.A.**, and by implication, s.18(1) of the **H.T.A.**.

A person does not cease to be the holder of a driver’s licence merely because the licence has not been signed [**R. v. Fuchs**, 1972, B.C.S.C.].

R. v. Clements (1983), 21 M.V.R. 74 (Alta. Prov. Ct.)

R. v. Fuchs (1972), 7 C.C.C. (2d) 366 (B.C.S.C.)

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Res Judicata: In **R. v. Preeper** [1984, B.C. Prov. Ct.] it was held that the principle of res judicata applies so as to permit a suspended driver to mislead a police officer as to the suspension, pay an out-of-court fine for drive motor vehicle — no licence, and avoid a subsequent charge of suspended driving based on the same facts. The **Preeper** holding, however, is opposite that of two higher courts in B.C.. In **R. v. Doro** [1984, B.C. Co. Ct.] and in **R. v. Moody** [1985, B.C. Co. Ct.] it was held that these were two separate offences and neither res judicata nor s.11(h) of the **Charter** prevented conviction on both charges. This was also the holding in **R. v. DeVries** [1964, Ont. Co. Ct.] regarding the now-repealed **Criminal Code** offence of driving while disqualified.

- R. v. Preeper (1984), 28 M.V.R. 193 (B.C. Prov. Ct.)
- R. v. Doro (16 July, 1984), unreported (B.C. Co. Ct.)
- R. v. Moody (1985), 33 M.V.R. 198 (B.C. Co. Ct.)
- R. v. DeVries, [1964] 1 O.R. 699, [1964] 2 C.C.C. 203 (Ont. Co. Ct.)
- s.18 H.T.A.

Responsibility of Owner of Motor Vehicle: The section of the N.B. legislation roughly similar to s.18(4) was held to require mens rea on the part of the owner who was “permitting” in the form of knowledge or recklessness. The Sask. legislation uses “allows” instead of “permits”. This was held to import a mental element which was neither strict liability nor mens rea but requires proof of sufficient facts from which it may be inferred that the accused failed to take those precautions which would be reasonable or prudent.

- R. v. McPhee, [1966] 1 C.C.C. 292 (N.B. Co.Ct.)
- R. v. Long Lake School Unit No. 30 Bd. (1973), 14 C.C.C. (2d) 307 (Sask. Q.B.), affirmed 18 C.C.C. (2d) 58 (Sask.C.A.)
- s.18(4) H.T.A.

Driver — Fail to Surrender Licence

“The right to drive a motor vehicle on the Queen’s highways has been defined to mean that the right is, in fact, a privilege to be exercised subject to certain restrictions contained in the **Highway Traffic Act**. Included in those restrictions are the obligations on the part of a prospective driver to be qualified; to hold an operator’s permit; to carry same; to carry the registration card of the motor vehicle owner; and to produce them when required. The enforcement of those provisions do not constitute an unlawful search and seizure.”

This statement of Schwartz J. of the Manitoba Queen’s Bench [**R. v. Moretto**, 1984] is, it is submitted, directly applicable to the Ontario provisions in s.19(1) of the **H.T.A.**. The Manitoba provisions were held not to contravene the **Charter**.

The right of a constable to demand production of a driver’s licence authorizes him to follow a driver onto an Indian Reservation or onto private property in “hot pursuit” and there to demand production of the licence [**R. v. Williams**, 1958, Ont. Mag. Ct.]. See also annotations to Spot Checks, s.30a, *infra*.

- R. v. Moretto (1984), 14 C.C.C. (3d) 427, 28 M.V.R. 290 (Man. Q.B.)
- R. v. Williams (1958), 120 C.C.C. 34 (Ont. Mag. Ct.)
- s.19(1) H.T.A.

Suspension on Conviction for Certain Offences

Constitutional Validity/Penalty or Civil Disability: The determination of the nature of provincial licence suspensions upon conviction for criminal driving offences is important in order to

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assess (i) whether such provisions are intra vires the provincial legislature and possibly (ii) whether cannons of statutory construction used in penal matters are applicable to these types of licence suspensions.

The Supreme Court of Canada has held that the automatic licence suspension provisions of the provinces of Prince Edward Island [**Egan**, 1941; **Bell**, 1973] and Ontario [**Ross**, 1973] are, in pith and substance, within the classes of subjects assigned to the provincial Legislatures [**Egan**, C.C.C. 244]. Such provincial legislation does not impose an additional penalty for the punishment of an offence already punished by the **Criminal Code** but merely provides for a civil disability arising out of a conviction for a criminal offence [**Egan**, C.C.C. 245 and 248]. Such civil consequences of a criminal act are not to be considered as “punishment” so as to bring the matter within the exclusive jurisdiction of Parliament [**Ross**, C.R.N.S. 324-5]. The **Egan** principle that such suspensions are not additional penalties imposed for a violation of criminal law but rather civil disabilities arising out of a conviction for a criminal offence was followed by the Ontario Court of Appeal in **R. v. Joslin** [1981], by the Ontario High Court of Justice in **Benn v. Registrar of Motor Vehicles et al.** [1981], by the Quebec Superior Court in **Lebel v. R. et al.** [1982] by the Saskatchewan and Manitoba Courts of Queen’s Bench in the **Watier** [1984] and **George** [1985] cases and by the British Columbia Court of Appeal in **R. v. Hildebrand** [1981].

The cases of **Rowland v. R.** [1984, Alta. Q.B.], **Gunter v. Registrar of Motor Vehicles** (N.B.) [1984, N.B.Q.B.] and **Gill v. Registrar of Motor Vehicles** (Ont.) [1985, Ont. C.A.] appear to be somewhat against these holdings. In the **Rowland** case O’Leary J. followed **R. v. Minister of Highways** [1959, Alta. S.C.] in holding that the claim to a driver’s licence is a right and not merely a privilege. The deprivation of that right, through provincial licence suspension legislation, however, was held not to violate s.7 of the **Charter**. The case did not directly address the penalty/civil disability issue. This issue was dealt with in the **Gunter** case, albeit without reference to any case law, where New Brunswick suspensions were held to be penal in nature [M.V.R. 43].

The Ontario context was considered in the **Gill** case where Finlayson J. A. appears to adopt the **Egan** and **Joslin** principle of civil disability while at the same time stating

“The fact that it is a civil disability does not oust Lord Coke’s rule however, and with great respect to the learned Justice, **Benn v. Reg. of Motor Vehicles**, supra, was wrongly decided . . . the rule does not relate solely to criminal sanctions but can include sanctions of any kind imposed by statute. The increase of licence suspensions from six months to three years cannot be construed as anything other than a penalty. Certainly it amounts to the deprivation of a property interest (a licence to operate a motor vehicle) and this could have consequences to an individual more serious than a term of imprisonment. In my view, s.26(1) should be construed as a piece of legislation in the same way that comparable sections of the **Criminal Code** are construed, and if an ambiguity is found . . . then Lord Coke’s rule should be applicable.” [M.V.R. 10]

Lord Coke’s rule is discussed below. It is submitted that the **Gill** case does not clearly refute the Court of Appeal’s earlier holding in **R. v. Joslin** and that insofar as licence suspensions are held to be penalties such holding was obiter dicta in that Lord Coke’s rule was held to be applicable to civil disabilities. That is the principle of the **Gill** case and that is why **Benn v. Reg. of Motor Vehicles** was overturned while **R. v. Joslin** was not.

Provincial Secretary of Prince Edward Island v. Egan, [1941] S.C.R. 396, 76 C.C.C. 227, [1941] 3 D.L.R. 305

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(S.C.C.)

Ross v. Registrar of Motor Vehicles for Ont.; Bell v. A.G. P.E.I. (1973), 23 C.R.N.S. 319, 42 D.L.R. (3d) 68, 1 N.R. 9, 14 C.C.C. (2d) 322 (S.C.C.)

Bell v. A.G. P.E.I. et al. (1973), 14 C.C.C. (2d) 336, 42 D.L.R. (3d) 82, 1 N.R. 27 (S.C.C.)

R. v. Joslin (1981), 10 M.V.R. 29, 59 C.C.C. (2d) 512, 6 W.C.B. 80 (Ont. C.A.)

Benn v. Reg. of Motor Vehicles (1981), 59 C.C.C. (2d) 421, 10 M.V.R. 214 (Ont. H.C.)

Lebel v. R. (1982), 30 C.R. (3d) 285, 18 M.V.R. 84, 3 C.R.R. 263 (Que. S.C.)

Watier v. Dir. of Motor Vehicle Admin. of Sask. et al. (1984), 28 M.V.R. 134, 34 Sask. R. 27 (Sask. Q.B.)

George v. Gov't. of Man. (1985), 35 M.V.R. 13 (Man. Q.B.)

R. v. Hildebrand (1981), 15 M.V.R. 150 (B.C.C.A.)

Rowland v. R. (1984), 13 C.C.C. (3d) 367, 28 M.V.R. 239, 33 Alta. L.R. (2d) 252, 56 A.R. 10, 10 D.L.R. (4th) 724 (Alta. Q.B.)

Gunter v. Reg. of Motor Vehicles for N.B. (1984), 33 M.V.R. 38, 59 N.B.R. (2d) 439, 15 D.L.R. (4th) 758, 154 A.P.R. 439 (N.B.Q.B.)

Gill v. Reg. of Motor Vehicles; Heffren v. Reg. of Motor Vehicles (1985), 35 M.V.R. 1, 21 C.C.C. (2d) 234 (Ont. C.A.)

R. v. Minister of Highways (1959), 28 W.W.R. 36 (Alta. S.C.)

-s.26(1) H.T.A.

Subsequent Convictions: The holding, in **Gill v. Reg. of Motor Vehicles** [supra] is applicable only to suspensions which took effect prior to December 14, 1984 when the **Highway Traffic Amendment Act**, S.O. 1984, c. 61, s.1 came into force. The Court of Appeal recognized this amendment as an apparent attempt to clarify the intent of the Legislature with respect to 26 subss.(1) and (2) [M.V.R. 5] but held it did not affect the case before them as the relevant suspensions predated the amendment. In the case of such suspensions [before 84/12/14] the **Gill** case indicates that to calculate the length of licence suspension the subsequent offence date must have followed an earlier conviction date to be considered as a "subsequent" conviction. That is, the chronology must be first offence followed by a conviction, then second offence followed by conviction, then third offence followed by conviction et cetera, before the second and third offences will attract the 2-year and 3-year licence suspensions respectively.

Note, however, that three amendments restrict the **Gill** case. First of all s.17a was added to the **Highway Traffic Act** on June 13, 1984. This section clearly states the policy involved in Part III of the **Act** [ss.17a to 40 inclusive] is protection of the public by selective granting of the privilege [not the right] of driving on an Ontario highway. This section goes a long way toward resolving the civil disability/penalty issue. The second relevant amendment was described above. Sections 26(2) and (2a) state the procedure for determining whether a conviction is a subsequent conviction. The sequence of convictions is now the only consideration and the effect of Lord Coke's rule, exemplified in the **Gill** case, is completely nullified in regard to s.26. As Laskin C.J.C. stated in **R. v. Skolnick** [1982, S.C.C.] Lord Coke's "three century old cannon of construction of penal provisions . . . ought not to be excluded unless the legislature has plainly said so" [C.C.C. 389, Emphasis added]. The third amendment, s.27(1a) and (1b), extends the s.26 procedure to determinations of subsequent convictions, in relation to **Criminal Code** s.242(4) charges for driving while disqualified, occurring after 85/12/20.

The current method for determination of subsequent convictions for the purposes of ss.26 and 27, therefore, gives no consideration to the sequence of commission of offences or whether any offence occurred before or after any conviction. The only consideration is the sequence of convictions.

Concurrent pleas are interpreted as consecutive convictions if arising from separate occurrences [**Boland**, 1982, Alta. Q.B.]. If a single occurrence results in multiple convictions, such as

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impaired driving and failing to remain under the **Criminal Code**, the cases are divided on whether conviction for one offence is subsequent to that for another. In the **Jack** case [1972, Man. Q.B.] it was held that multiple convictions arising out of the same occurrence were to be considered as one conviction. In the **Watier** case [1984, Sask. Q.B.] **Jack** was not followed and Watier's conviction for fail to remain was considered subsequent to the impaired driving conviction arising from the same set of circumstances.

The word "conviction" includes the sentence of the court. Where the accused has been found guilty but sentencing has been adjourned he is not a convicted person [**Re Regina and Smith**, 1978, Sask. C.A.].

Gill v. Reg. of Motor Vehicles, *supra*

R. v. Skolnick, [1982] 2 S.C.R. 46, 16 M.V.R. 35, 29 C.R. (3d) 143, 68 C.C.C. (2d) 385 (S.C.C.)

Boland v. Reg. of Motor Vehicle Branch (Alta.) (1980), 9 M.V.R. 87 (Man. Q.B.)

Jack v. Reg. of Motor Vehicles, [1972] 4 W.W.R. 602, 27 D.L.R. (3d) 370 (Man. Q.B.)

Watier v. Dir. of Motor Vehicle Admin. (Sask.), *supra*.

Re Regina and Smith (1978), 39 C.C.C. (2d) 229 (Sask. C.A.)

-ss.26(2), (2a) H.T.A.

Order Extending Suspension: The power of the Judge to make an order extending suspension under s.26(3)(b) was held to be intra vires the provincial Legislature notwithstanding that it amounts to a delegation of the provincial government's power to suspend licences (originating in s.92 para. 15 of the **Constitution Act 1867**) to a Judge, thereby giving the Judge additional sentencing power. Accordingly, as the province has the power to suspend licences then they must be considered to have the power to provide punishment for breach of the suspension [**Carroll v. R.**, 1984, Ont. Co. Ct.].

Carroll v. The Queen (1981), 35 O.R. (2d) 532, 14 M.V.R. 175 (Ont. Co. Ct.)

-s.26(3) H.T.A.

Appeals: Because the suspension is not an additional penalty imposed for a violation of the criminal law but a civil disability arising out of a conviction for a criminal offence any appeal from an order imposing the additional suspension must be made separate from or in addition to an appeal from sentence [**R. v. Joslin**, 1981, Ont. C.A.]. Section 26(5) is not a criminal process which is ultra vires of the province but instead it simply provides for a means of appeal by criminal process procedure and does not affect the (federal) power [**Carroll v. The Queen**, 1981, Ont. Co. Ct.].

R. v. Joslin, *supra*

Carroll v. The Queen, *supra*

-s.26(5) H.T.A.

Charter Issues: The B.C. provisions similar to s.26 survived an attack re: sections 7, 11(d), (h) and 12 of the **Charter** [**R. v. Janes** 1983, B.C. Prov. Ct.]. A mandatory minimum three year licence suspension upon conviction was held not to be cruel and unusual punishment as per s.12 of the **Charter** [**R. v. Ross**, 1985, B.C.S.C.]. The same was held regarding a mandatory minimum seven-day imprisonment prescribed for a first offence of driving while suspended [**R. v. Konechny**, 1983, B.C.C.A.] nor was this sentence contrary to ss.9 or 10. Note, however, that in the **Konechny** case the conviction was for a mens rea offence. In **Reference Re Section 94(2) of the Motor Vehicle Act** [1985, S.C.C.] a similar term of imprisonment was held to violate s.7 of the **Charter** where the offence, again disqualified driving, was one of absolute liability. An automatic six month suspension for driving without a subsisting licence was held not to be unreasonable having regard to both the nature of the offence from which it flowed and the

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purpose of the legislation, which was the protection of the public; section 7 of the **Charter** was not offended.

R. v. Janes (1983), 21 M.V.R. 316 (B.C. Prov. Ct.)

R. v. Ross (1985), 32 M.V.R. 261 (B.C.S.C.)

R. v. Konechny (1983), 10 C.C.C. (3d) 233, 38 C.R. (3d) 69, 25 M.V.R. 132, [1984] 2 W.W.R. 481, 6 D.L.R. (4th) 350 (B.C.C.A.)

Reference Re Section 94(2) of the Motor Vehicle Act (B.C.) (1985), 23 C.C.C. (3d) 289, 48 C.R. (3d) 290, 36 M.V.R. 240 (S.C.C.)

s.26 H.T.A.

Suspension for Default in Payment of Fine

The Justice is not required to grant a hearing before issuing an order pursuant to s.26a(2) [now s.29(2)], as the act to be performed is administrative as opposed to judicial or quasi-judicial.

R. v. Giagnocavo (1975), 32 C.R.N.S. 27 (Ont. S.C.)

-s.29 H.T.A.

Spot Checks

Common Law: In **R. v. Dedman** [1985] the Supreme Court of Canada considered the question of police spot checks prior to the existence of s.30a. The majority held that these random stops fell within the general scope of police duties and were not an unjustifiable use of police power as such stop checks were necessary and reasonable having regard to the nature of the liberty interfered with, the important public purpose served and the minor inconvenience to the party.

R. v. Dedman (1985), 20 C.C.C. (3d) 97, 46 C.R. (3d) 193, 34 M.V.R. 1, 60 N.R. 34 (S.C.C.)

-s.30a H.T.A.

Section 30a: Section 30a(1) provides for a specific power to stop regarding spot checks as opposed to s.189a(1) which refers to a general power to stop. Note that a 12-hour licence suspension cannot be utilized where a **Criminal Code** charge is laid if that charge is supported by a breathalyzer reading of less than 50 milligrams or if a breathalyzer reading is not demanded. The same is true regarding a charge such as dangerous driving or criminal negligence. However where the driver is charged with failure to provide a sample contrary to s.238 of the **Criminal Code** the 12-hour suspension may be used according to s.30a(4).

ss.30a(1) and (4) H.T.A.

Police Officer's Grounds: The British Columbia spot check provisions were the subject of **R. v. Brush** [1977, B.C.S.C.]. At that time subsection 203(1) indicated that the licence of a person "over 80" would be subject to suspension. It was held, therefore, that the provision in s.203(2) regarding spot checks permitted same only if the officer had reason to believe the driver was "over 80". A similar issue arose in **R. v. Robson** [1985, B.C.C.A.]. In the interim s.203 was amended so as to delete any reference to "over 80"; the new provision s.214(2), was held to be in violation of s.7 of the **Charter**. Section 214(2) was void for vagueness because (1) the officer need have only "reason to suspect" [not a belief or grounds for same] (2) that the driver had consumed alcohol [no amount specified; no limitation as to when consumption took place] and (3) the driver's ability to operate a motor vehicle was not considered, i.e., impairment was not a prerequisite to a 24 hour licence suspension. As a result of the evident absence of procedural fairness in s.214(2) the deprivation of liberty involved was held to be contrary to principles of fundamental justice.

The Alberta spot check provisions were also held to violate s.7 of the **Charter**. Although

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the Alberta legislation did link the ability to drive with the consumption of alcohol it was held to be no improvement on the British Columbia provisions in terms of the discretion afforded the police. The police officer need only suspect that the driver had consumed sufficient alcohol as to affect his ability to drive. The court required that the officer have a belief in the facts. In **R. v. Neale** [1985, Alta. Q.B.] McDonald J. stated:

“It is useful to take a purposive approach. The purpose of requiring that a police officer have a belief in the facts set forth in s.110(1), and that that belief be based on reasonable and probable grounds, is that such an objective criterion provides a consistent standard for identifying the point at which the interests of the state in such infringements of liberty come to prevail over the interest of the individual in being free to operate a motor vehicle as and when he will. To permit such an infringement on the basis of mere suspicion would establish a very low standard [M.V.R. 273].”

In Ontario s.30a(1) gives a police officer the authority to stop a motor vehicle for the purpose of determining whether or not there is evidence to justify making a demand under s.238 of the **Criminal Code**. The power to stop the motor vehicle is unconditional and has been held not to violate sections 7, 8 or 9 of the **Charter** [**R. v. Fraser**, 1984, Ont. Co. Ct.].

The power to make a s.238 demand, however, is conditional on the existence of evidence justifying such demand. There can be no suspension in Ontario unless a s.238 [Code] demand has been made. The standard employed is, necessarily, the same standard required in s.238 [Code]. Here a difficulty arises because s.30a(2) and (3) do not specify which subsection of s.238 [Code] supplies this standard. Two standards are employed in s.238 [Code]. Section 238(2) [Code] refers to a roadside screening test; here the officer must reasonably suspect the driver has alcohol in his body. Section 238(3) [Code] involves breathalyzer testing; this type of demand is made where the police officer believes on reasonable and probable grounds that the person is committing [or has within two hours committed] a s.237 [Code] offence, i.e., operate motor vehicle/care or control while ability impaired/“over 80”.

Presumably if the spot check demand is made under s.30a(2) [roadside test] the “reasonable suspicion of alcohol” standard is sufficient grounds for the police demand. On the other hand if the officer making the spot check is using a breathalyzer machine, s.30a(3), he must believe [subjectively] on reasonable and probable grounds [objective test] that the driver has consumed alcohol and that, as a result his ability to drive is impaired or he is “over 80”. This would result in two quite different standards of justification for making an s.238 [Code] demand under ss.30a(2) and (3). It is notable that, should this be the case, the s.30a(2) standard for roadside test demands would not meet the test in **R. v. Neale** and would, on that basis, violate s.7 of the **Charter**. Another difficulty with this s.30a(2) standard is that it fails the **R. v. Robson** test in that a demand pursuant to s.238(2) [Code] is based only on a reasonable suspicion of alcohol in the driver’s body — the driver’s ability to operate a motor vehicle is not a factor. If **R. v. Robson** is correct s.238(2) [Code] is contrary to s.7 of the **Charter**.

It is submitted that insofar as it stands for the proposition that the consumption of alcohol must be tied to ability to drive the **Robson** case is incorrect. The gravamen of an “over 80” offence is not the same as that for impaired driving; no impairment is required in the former case. Similarly the ability to operate a motor vehicle does not operate as an excuse to avoid a s.30a(5) licence suspension. Section 30a is, in effect, an “over 50” procedure. To qualify one need only have a breathalyzer reading of “over 50” or a similar measurement [“Warn”] on a roadside screening device. Section 30a is a “preventative patrol” procedure — it removes prospective dangers from the roads — it distinguishes between the driver’s ability to operate a motor vehicle and his optimum ability to do so; impairment is not in issue.

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Regarding the standard to be employed it is submitted that the police officer should believe on reasonable and probable grounds that the driver has alcohol in his body and the demand should not be made unless the officer reasonably suspects that the driver would register “Warn” or “over 50”. In practice the reasonable suspicion of “over 50” would often be derived from the reasonable and probable belief in the presence of alcohol. There will, however, be occasions where the driver with one beer on his breath is obviously sober and “under 50”. In such a situation the officer will have no grounds to make a demand.

R. v. Brush (1977), 35 C.C.C. (2d) 177, 2 B.C.L.R. 230 (B.C.S.C.)

R. v. Robson (1985), 45 C.R. (3d) 68, 31 M.V.R. 220 (B.C.C.A.)

R. v. Neale (1985), 20 C.C.C. (3d) 415, 46 C.R. (3d) 366, 34 M.V.R. 245, 39 Alta. L.R. (2d) 24, 62 A.R. 350 (Alta. Q.B.)

R. v. Fraser (1984), 28 M.V.R. 209 (Ont. Co. Ct.)

-ss.30a(2)-(4) H.T.A.

Constitutionality: In **R. v. Wolff** the British Columbia version of s.30a [albeit a 24-hour suspension] was held to be intra vires the legislative capacity of the province.

A suspension under s.30a does not involve the “charging” of the driver with an offence. As a result s.11(h) of the **Charter** does not apply [**R. v. Huber**, 1985, Ont. C.A.]. A similar finding regarding s.11(d) of the **Charter** was made concerning the Alberta legislation in **R. v. Ferris** [1985, Alta. Prov. Ct.].

In terms of a restriction on the s.7 **Charter** right to liberty it is submitted that the Ontario legislation, with its 12-hour suspension, is much less restrictive and more closely tied to the policy of removing drivers from the road while they are under the influence of alcohol than are the 24-hour suspension provisions in other jurisdictions.

R. v. Wolff (1979), 46 C.C.C. (2d) 467, 6 C.R. (3d) 346, 1 M.V.R. 261, 9 B.C.L.R. 390 (B.C.C.A.)

R. v. Huber (1985), 36 M.V.R. 10 (Ont. C.A.)

R. v. Ferris (1985), 33 M.V.R. 167 (Alta. Prov. Ct.)

-s.30a H.T.A.

Autre Fois Acquit/Convict and Res Judicata: Res judicata is unavailable to assist a person charged with “over 80” and driving while prohibited during a spot check temporary suspension. In **A.-G. B.C. v. Bennewith** [1983, B.C.S.C.] the defendant had been given a 24-hour suspension which he chose to ignore a short while later. He was then charged with “over 80” and driving while prohibited [in relation to the roadside suspension]. It was held that res judicata was unavailable even though the defendant’s driving was one continuous circumstance common to the laying of both charges. The elements of the two offences were held to be so substantially different as to make the principle of res judicata inapplicable. The “over 80” offence is directed towards driving while the accused person has a certain physical condition while the traffic offence is directed towards driving while the accused has a legal status that prohibits him from doing so.

In **R. v. Huber** [1985] the Ontario Court of Appeal held a temporary suspension under s.30a was not a conviction for an offence and hence the plea of autre fois convict was not available to a person who was charged with “over 80” and had his licence suspended under s.30a for 12 hours.

A.-G. B.C. v. Bennewith (1983), 26 M.V.R. 1 (B.C.S.C.)

R. v. Huber, supra

-s.30a H.T.A.

Records: Section 30a(10)(a) indicates that a police officer shall record the particulars of each

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suspension he effects under s.30a. In British Columbia an officer must also forward such reports to the superintendent. In **R. v. Hardy** [1983, B.C.S.C.] it was held that the reporting provision was not a condition subsequently required to complete the commission of an offence of driving while under roadside suspension. The suspension operates immediately upon the request to surrender the driver's licence. The reporting provisions are administrative.

R. v. Hardy (1983), 22 M.V.R. 239 (B.C.S.C.)
-s.30a(10) H.T.A.

Appeal Procedures

Note at the second level of appeal the County Court Judge may "confirm, modify or set aside the decision of the board".

-s.32(4)

This includes the option of a trial de novo with the onus on the Registrar (on the balance of probabilities) to show cause why the licence should be suspended.

Re Williams and The Registrar of Motor Vehicles (1973), 2 O.R. (2d) 473 (Ont. Co. Ct.)
-s.32 H.T.A.

Service

The deeming provisions of s.34 amount to a reverse onus provision requiring the defendant to prove, on the balance of probabilities, "that he did not, acting in good faith, through absence, accident, illness or other cause beyond his control, receive the notice." Such evidence is peculiarly within the defendant's knowledge. Allowing the opportunity to lead such evidence does not amount to compelling the accused to testify against himself. It is submitted therefore that s.34 does not violate s.11(d) of the **Charter** [**R. v. Demelo**, 1983, B.C. Prov. Ct.].

The Manitoba provision, regarding service, which deemed that mailing of the notice was conclusive proof of service was held to offend s.7 of the **Charter** [**R. v. Blackbird**, 1983, B.C. Prov. Ct.]. A similar conclusion was reached regarding New Brunswick legislation which deemed the notice effective four days after mailing. It was also noted, however, that New Brunswick had not adopted automatic suspension [as did some other provinces] and it was, therefore, necessary for the driver to receive notice [**Robichaud v. R.**, 1984, N.B.Q.B.]. In **R. v. Alston**, [1985, B.C.C.A.] it was held that the absence of provisions requiring the registrar to issue notice left a legislative gap such that there was no rational connection between proof of the suspension and knowledge of same by the accused. A corresponding reverse onus was, therefore, contrary to s. 11(d) of the **Charter**. This would apparently over-rule **R. v. McLean** [1982, B.C. Prov. Ct.].

British Columbia legislation which, upon conviction for certain driving offences, automatically and without notice prohibits driving was held not to violate the **Charter**. Although not requiring written notice the legislation would result in verbal notice at trial [**R. v. Simonson**, 1985, B.C. Co. Ct.].

The Alberta Court of Appeal held that where the statute indicates that suspension is immediate upon conviction for certain offences [see s.26] it is not necessary for notice of any kind to be given. This is so regardless of other statutory provisions for service [see s.34] or provisions which deem the existence of prima facie proof of suspension upon production of the Registrar's certificate [see s.187(3)] [**R. v. Christman**, 1984, Alta. C.A.].

In **R. v. Coleman** [1985, Man. Q.B.] it was held that where the notice of suspension had been mailed to the last known address of the accused but was returned by the Post Office

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marked “unknown” the accused could rely on a defence of reasonable mistake of fact. It is submitted, for reasons outlined in the annotations to s.35 *infra*, that this case was wrongly decided as it fails to evaluate the reasonableness of the mistake of fact in terms of the exercise of due diligence in the performance of a duty prescribed by statute, i.e., change of address.

- R. v. Demelo (1983), 3 C.R.R. 376 (B.C. Prov. Ct.)
- R. v. Blackbird (1983), 22 M.V.R. 130 (Man. Prov. Ct.)
- Robichaud v. R. (1984), 29 M.V.R. 190 (N.B.Q.B.)
- R. v. Alston (1985), 36 M.V.R. 67, 22 C.C.C. (3d) 563 (B.C.C.A.)
- R. v. McLean (1982), 20 M.V.R. 45 (B.C. Co. Ct.)
- R. v. Simonson (1985), 31 M.V.R. 318 (B.C. Co. Ct.)
- R. v. Christman (1984), 29 M.V.R. 1 (Alta. C.A.)
- R. v. Coleman (1985), 31 M.V.R. 258 (Man. Q.B.)
- s.34 H.T.A.

Driving While Driver’s Licence Suspended

Nature of Offence: In Nova Scotia [**R. v. MacDougall**, 1982, S.C.C., **R. v. MacLellan**, 1983, C.A.], Manitoba [**R. v. Coleman**, 1985, Q.B.], Alberta [**R. v. Christman**, 1984, C.A.] and Ontario [**R. v. Robertson**, 1984, Prov. Ct.] driving while suspended has been held to be a strict liability offence. Note that s.35 proscribes a regulatory offence which does not involve public safety considerations; it also levies a rather severe penalty. These factors support the holding in **R. v. Robertson** that the offence is one of strict, not absolute, responsibility. If the Crown adduces evidence to show that the accused was driving at a time when his licence was under suspension a *prima facie* case is established. The accused must then prove, on a preponderance of evidence, that he exercised due diligence or was operating under a reasonable mistake of fact.

Section 94(2) of the **Motor Vehicle Act**, R.S.B.C. 1979, c. 288 states that the British Columbia proscription regarding suspended or prohibited driving “creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.” In the reference case regarding this provision the Supreme Court of Canada, affirming the judgment of the British Columbia Court of Appeal, held that this absolute liability offence, because the penalty included incarceration, violated s.7 of the **Charter** specifically the right to liberty [**Reference Re s.94(2)**, 1985] the predecessor to this section was the subject of dispute in **R. v. Jack**. The **Jack** case was heard after the Court of Appeal’s decision in the **94(2)** case. The minor differences in the amended legislation were not in issue. Hinds J., in **R. v. Jack** [1983, B.C.S.C.] held that the provision created a strict liability offence. This would seem to be a sound assessment of the current state of the law in British Columbia; such was suggested as reasonable by Lamer J., for the majority of the S.C.C., who measured s.94(2) against the standard of a strict liability offence.

- R. v. MacDougall, [1982] 2 S.C.R. 605, 54 N.S.R. (2d) 562, 18 M.V.R. 180, 31 C.R. (3d) 1, 112 A.P.R. 562, 1 C.C.C. (3d) 65, 142 D.L.R. (3d) 216, 44 N.R. 560 (S.C.C.)
- R. v. MacLellan (1983), 23 M.V.R. 236, 60 N.S.R. (2d) 426, 128 A.P.R. 426 (N.S.C.A.)
- R. v. Coleman (1985), 31 M.V.R. 258 (Man. Q.B.)
- R. v. Christman (1984), 29 M.V.R. 1 (Alta. C.A.)
- R. v. Robertson (1984), 30 M.V.R. 248, 43 C.R. (3d) 39 (Ont. Prov. Ct.)
- Reference Re Section 94(2) of the Motor Vehicle Act (B.C.) (1985), 23 C.C.C. (3d) 289, 48 C.R. (3d) 290, 36 M.V.R. 240 (S.C.C.)
- R. v. Jack (1983), 21 M.V.R. 198 (B.C.S.C.)
- s.35(1) H.T.A.

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Validity of Suspension: Provincial suspensions of driving privileges are only valid in the province in which they are imposed. A prohibition, made pursuant to provincial legislation, from driving “any motor vehicle on any highway in Canada” is in excess of jurisdiction as the only intra vires consideration of provincial legislation must be safety on the provincial highways and not the punishment of the accused [**James v. The Queen**, 1984, B.C. Co. Ct.; see also s.17a of the **H.T.A.**].

Some provinces, however, have legislated reciprocal licence suspension agreements [see s.307 of the **Motor Vehicle Act**, R.S.N.B. 1973, c. M-17]. In Saskatchewan ex juris convictions can only be taken into account when fixing the period of suspension in respect of recognized offences committed within the province, that is, they may only be counted for the purpose of establishing previous convictions [**Shaeffer v. Highway Traffic Board 1984**, Q.B.]. In Ontario s.172(4) may apply so as to suspend the driver’s licence of a person who fails to satisfy an out-of-province judgment rendered and become final against him.

An error on the face of a notice of suspension has been held sufficient to quash the decision of the Registrar. In **Gunter v. Registrar of Motor Vehicles for New Brunswick** [1984, Q.B.] the applicant’s suspension was quashed because the reason for the suspension was indicated as “impaired driving — s.234” when the actual reason was the effect of a reciprocal agreement with the state of Maine regarding the applicant’s conviction for “operating under the influence of intoxicating liquor.” The **Gunter** case may be distinguishable in Ontario on the basis that the judgment was based on the premise that the provincial suspension was penal in nature [not a civil disability] and should, therefore, be strictly construed. The New Brunswick legislation was also considered to be vague and provided the Registrar excessive discretionary powers. See sections 17a and 26 for the Ontario position.

A mandatory three-year driving prohibition, for example s.189a(3), is not cruel and unusual punishment within the meaning of s.12 of the **Charter** even where the accused is a professional driver [**R. v. Ross**, 1985, B.C.S.C.] nor is an automatic six-month suspension for driving while driver’s licence suspended [in Ontario, s.35(3)] an infringement of s.7 of the **Charter**. Such a suspension is a reasonable limit on the right to life, liberty and security of the person and having regard to both the nature of the offence from which it flows and the purpose of the legislation [the protection of the public] the limit accords with the principles of fundamental justice [**Rowland v. R.**, 1984, Alta. Q.B.].

Also note that s.22 prohibits a driver, whose Ontario driver’s licence is suspended, from driving in Ontario under the “authority” of a licence from another jurisdiction; the out of province licence may be seized if the offence, committed in Ontario, results in a licence suspension in the other province [**R. v. Gour**, 1986, Ont. C.A.].

See the annotations for s.34 regarding the effect of notice on the validity of suspensions.

James v. The Queen (1984), 28 M.V.R. 26 (B.C. Co. Ct.)

Shaeffer v. Highway Traffic Board (1984), 27 M.V.R. 191, 33 Sask. R. 260 (Sask. Q.B.)

Gunter v. Registrar of Motor Vehicles for New Brunswick (1984), 33 M.V.R. 38, 59 N.B.R. (2d) 439, 15 D.L.R. (4th) 758, 154 A.P.R. 439 (N.B.Q.B.)

R. v. Ross (1985), 32 M.V.R. 261 (B.C.S.C.)

Rowland v. R. (1984), 28 M.V.R. 239, 33 Alta. L.R. (2d) 252, 56 A.R. 10, 13 C.C.C. (3d) 367, 10 D.L.R. (4th) 724 (Alta. Q.B.)

R. v. Gour (1986), 40 M.V.R. 139 (Ont. C.A.)

-s.35(1) H.T.A.

Methods of Proof: (i) Documents; the Registrar’s Certificate of Suspension [annexed to the

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record of the suspension sent to the defendant] is, by virtue of s.184(3), prima facie evidence of the facts contained therein and shall be received in evidence in all courts without proof of the seal or signature of the Registrar. The Registrar's signature is sufficiently represented by an engraved, lithographed, printed or otherwise mechanically reproduced facsimile [s.184(4)]. The signature of the Deputy Registrar will also suffice [**R. v. Matthes**, 1985, B.C.S.C.; see also the **Interpretation Act (Ontario)** ss.27(m) and 30.30]. A British Columbia provision that such certificate constituted proof of the defendant's knowledge of the prohibition was held to contravene the defendant's s.11(d) **Charter** right to be presumed innocent because there was no rational connection between the fact of suspension and the defendant's knowledge of the fact [**R. v. Johnson**, 1984, S.C.]. In **R. v. Alston** [1985] the British Columbia Court of Appeal came to the same conclusion because there were no statutory provisions requiring notice to be served.

- (ii) **Demerit Point Suspensions**: (see also s.185) a close examination of ss.7(1)(a) and 12(1) of **O.Reg. 359/81** would indicate two methods of calculation regarding the period of suspension. The first is based on the date the licence was surrendered; the second is based on the date the licence was suspended. In **R. v. Ghany** the Ont. C.A. held that "surrender" demanded something more than the mere assertion by the person charged that he has posted his licence on a certain day. For the surrender to be complete there must be a receipt by the Registrar of the licence for the 30 day period . . . to start running. As the Registrar's Certificate of Suspension (above) is prima facie proof of the suspension having been in effect the onus is on the defence to submit positive proof of the date of receipt, by the Registrar, of the licence. If it is proved that the licence was received prior to the "effective" date in the Notice of Suspension the 30 day suspension begins on the date of receipt not on the "effective" date.

The second method of calculation is used where the licence is not surrendered prior to the "effective" date and continues for two years or, using the first method of calculation, 30 days after the surrender, whichever occurs first.

R. v. Matthes (1985), 32 M.V.R. 303 (B.C.S.C.)

R. v. Johnson (1984), 28 M.V.R. 85, 14 C.C.C. (3d) 92, 11 D.L.R. (4th) 739 (B.C.S.C.)

R. v. Alston (1985), 36 M.V.R. 67, 22 C.C.C. (3d) 563 (B.C.C.A.)

R. v. Ghany (1983), 19 M.V.R. 169 (Ont. C.A.)

R. v. Ronald Anderson Scott, unreported (18 Oct. 1984) Northumberland County Provincial Offences Court (W. Jacklin, J. P.)

-s.35(1) H.T.A.

Defences: (i) **Officially Induced Error of Law or Colour of Right**; the prospect of introducing a defence of justification based upon reliance on "officially induced error" arose in **R. v. MacDougall** [1982, supra, Nature of Offence]. There the Supreme Court of Canada was considering the possibility of such a defence in relation to the Nova Scotia provisions regarding suspended driving. Mr. MacDougall had been driving while under the erroneous understanding that his suspension, which took effect immediately upon the quashing of his appeal from an earlier offence, would not begin until he received notice from the Registrar. [In Ontario the issue would have been resolved by s.37 which clearly states the effect of an appeal on a suspension.] The case was appealed; MacDonald J. A. was not convinced that MacDougall's mistake was purely one of law and thought that "it was a reasonable mistake based on certain acts of the Registrar and may be but an error of fact or a mix of both fact and law" [31 C.R. (3d) 1 at 9]. Ritchie J., for the Supreme Court of Canada, accepted this reasoning and agreed that "an offence could be committed under mistake of law arising because of, and therefore induced by, 'officially induced error' . . ." [p. 10]. The facts of the **MacDougall** case, however,

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did not lend themselves to proving this offence and, in the result, this passage is obiter dicta. Mr. Justice Ritchie also commented on the clear and imperative language of the relevant section of the **Nova Scotia Motor Vehicle Act** before stating that “the failure to appreciate the legal duty imposed by that law is of no solace to the appellant” [p. 11].

The **MacDougall** case has led to the misconception that “officially induced error” is emerging as a common law exception to the rule that ignorance of the law is no excuse. This rule is codified by s.19 of the **Criminal Code** and s.81 of the **Provincial Offences Act**. No common law defence may be created or applied so as to be inconsistent with these codifications [s.7(3) **Criminal Code**, s.80 **P.O.A.**]. If it exists at all the defence of officially induced error must relate to something other than bald ignorance of the existence of the law. The issue then arises whether there is a valid distinction between “I didn’t know the act was illegal” and “I didn’t know the act was illegal for me.”

In **R. v. Molis** [1980, S.C.C.] Lamer J., for a unanimous seven person court, stated that “. . . Parliament has by the clear and unequivocal language of s.19 chosen not to make any distinction between ignorance of the existence of the law and that as to its meaning, scope or application” [C.C.C. p. 563]. Surely no less can be the case with s.81 of the **P.O.A.** There is a relaxation of these rules, however, where the offence is proscribed by a regulation. Section 11(2) of the **Statutory Instruments Act**, 1970-71-72 (Can.), c. 38 and s.5(3) of the **Regulations Act**, R.S.O. 1980, chap. 446 are to the general effect that no person is to be convicted under an unpublished regulation unless he has had notice of it. This would seem to suggest, as did O’Hearn C.C.J. in **R. v. Maclean** [1974, N.S. Co. Ct.], that a distinction may be drawn between statutes and subordinate legislation based on the limited accessibility of the latter. If this distinction is valid it may well be that a further distinction should be recognized regarding individual licence suspensions with the result that persons suspended without notice could mount a defence on that basis.

In the **MacDougall** case Ritchie J. cited s.19 of the **Criminal Code** and followed it with the statement that “this is no more than a codification of the common law rule and undoubtedly applies in the present [provincial offence] case” [C.R. p. 9]. It is unclear whether it is the common law rule or s.19 which “applies”. It is submitted that Ritchie J. was referring to the common law rule from which he was suggesting the evolution of a common law defence of officially induced error. The situation in Ontario is markedly different than that in the **MacDougall** case because of s.81 of the **P.O.A.** which statutorily bars such developments. Such was the basis for the decision, in **R. v. Robertson**, [1984, Ont. Prov. Ct.] that the defence of officially induced error is not available in Ontario.

Nor can “officially induced error” attain validity under the rubric of a due diligence defence. A defence of due diligence may be open to the accused if he has received no notice of his suspension and if the suspension was not “automatic”. The distinction is expressed by Lamer J. in the **Molis** case; “the defence of due diligence that was referred to in **Sault Ste. Marie** is that of due diligence in relation to the fulfilment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation” [C.C.C. 564].

The only possible application of a defence of officially induced error, it is submitted, is where the error pertains to a mistake of fact or mixed fact and law. In the result only a defendant whose suspension is not automatic (for mistakes regarding mandatory suspensions would have to be mistakes of law) is eligible to claim he was misled as to the question of whether he was in fact suspended by operation of a discretionary power. If the defence exists in Ontario it must be in this limited sense.

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Recall that Langdon P.C.J. held that s.81 of the **P.O.A.** effectively precluded the emergence of a defence based on ignorance of the law however such ignorance arises [**R. v. Robertson**, M.V.R. p. 261]. A similar conclusion regarding s.19 of the **Criminal Code** and criminal offences was made in **R. v. Potter** [1978, P.E.I.S.C.]. The defence might be available, however, in regard to provincial offences in jurisdictions where the common law rule regarding ignorance of the law has not been codified. Langdon P.C.J. concluded that where officially induced error is available the following (at least) are the elements of the defence:

- “1. The actor must advert to his legal position, i.e., he must be (or become) mistaken as to the law after inquiry; not merely ignorant of the law.
2. The actor must seek advice from an official who will usually be a member of a government or a government agency.
3. That official must be one who is involved in the administration of the law in question.
4. The official must give erroneous advice.
5. The erroneous advice must be apparently reasonable.
6. The error of law must arise because of the erroneous advice.
7. The actor must be innocently misled by the erroneous advice, i.e., he or she must act in good faith and without reason to believe that the advice is indeed erroneous.
8. The actor’s error in law must be apparently reasonable.
9. The actor, when seeking the advice of the official, must act in good faith and must take reasonable care to give accurate information to the official whose advice he solicits. Otherwise it would be open to the actor to seek official advice based on negligently misrepresented facts, to receive and act on that advice if it induces an error of law and then to assert the defence, thus enabling the defendant to profit by his own negligence.” [**R. v. Robertson**, M.V.R. pp. 255-6].

There remains the problem of proof. The defendant may lead evidence as to what he was told by the official; this is not hearsay evidence as it is not introduced for the truth of the statement, which is obviously erroneous, but to prove it was made and was acted upon by the defendant. The problem is credibility. It is suggested that if the defendant has received a document which he claims to have had “clarified” by an official such clarification, to be reasonable, should also be documented. It is too easy for a defendant to testify that he spoke to “someone at a ministry”. The defendant must prove he was misled. Such proof must be made on a preponderance of evidence. Credibility was the key issue in **R. v. Sangha** [1984, B.C. Co. Ct.]. Mr. Sangha, an East Indian gentleman with little facility in English, claimed to interpret the premature receipt of his suspended licence as permission to drive. It had been automatically suspended for his fourth drinking and driving conviction. Each previous conviction had resulted in a six month suspension of driving privileges. Shortly after the fourth period of suspension began the third period ended and the superintendent of Motor Vehicles returned Mr. Sangha’s licence in error. The trial Judge disbelieved Mr. Sangha and concluded that he knew or should have known that his licence was suspended. Skipp Co. Ct. J., on appeal was of the opinion that the trial Judge considered some factors which were inappropriate to assess Mr. Sangha’s credibility and ordered a new trial. His Honour Judge Skipp stated that “before **R. v. MacDougall** can be evoked the presiding Judge must find appellant to be credible; that is, the appellant’s testimony that he believed he was entitled to drive must be found to be credible” [M.V.R. p.

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32]. The **Sangha** judgment does not address the issue of provincial codification of the rule regarding ignorance of the law.

See also Nancy S. Kastner, B.A., LL.B., LL.M., Assistant Crown Attorney [Peel Region], "Mistake of Law and the Defence of Officially Induced Error", 28 Criminal Law Quarterly 308-340 (1986).

Defences: (ii) Due Diligence/Reasonable Mistake or Fact/Notice: Curiously it was a driver's licence case that became the impetus for the creation of strict liability offences. In **R. v. Sault Ste. Marie** [1978, S.C.C.] Mr. Justice Dickson, as he then was, related [at C.R. p. 44]:

"The case which gave the lead in this branch of the law is the Australian case of **Proudman v. Dayman** (1941), 67 C.L.R. 536, where Dixon J. said, at p. 540:

It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence."

In **R. v. MacLellan** [1983, N.S.C.A.] it was held that the offence of "drive motor vehicle while privilege of obtaining licence revoked" was a strict liability offence and therefore

"(1) the Crown did not have to prove the respondent had knowledge of the revocation of his privilege of obtaining a licence, and (2) the respondent had to prove on a balance of probabilities that all reasonable care was taken to avoid the commission of the offence . . . [and] as the burden of proof was on [the defendant, the Crown having proved the facts of (i) suspension and (ii) driving] . . . it was incumbent upon him to establish on the balance of probabilities by credible evidence the defence of mistake of fact or the absence of negligence" [M.V.R. p. 242].

The mistake of fact must be honest. In **R. v. McFerran** [1983, B.C. Co. Ct.] the trial Judge's assessment of the accused and his witnesses as incredible was not disturbed on appeal.

In a successful defence the mistake of fact must be reasonable as must the care taken to avoid the commission of an offence if the accused is able to claim he exercised due diligence in relation to the fulfilment of a duty imposed by law. The accused's defence must, therefore, be assessed in terms of its reasonableness. It is submitted that each driver is under a constant and continuous duty to ensure he or she is operating a motor vehicle within the parameters of the privilege to do so. Certain statutory directions, especially relevant to suspensions for unpaid fines, may assist in evaluating a defence to a charge of drive disqualified. Section 29(2) and **Ontario Regulation 463** indicate a duty to pay outstanding fines if suspension of driving privileges is to be avoided. A driver must also notify the Ministry of any change in address so the Ministry can contact him regarding any change in status [s.9(2) re: permit and see **Ontario Regulation 462**, s.19 re: driver's licence]. These statutory duties, it is submitted, are legislative directions to all drivers and must certainly be evidence of the minimum due diligence required to maintain an up-to-date assessment of one's driving privileges. Surely a defendant cannot rest his defence on non-receipt of notice if he has failed to cross the threshold of reasonableness as indicated by statute. If he has failed to notify the Ministry of a change in address he then assumes full responsibility for acquiring notices sent to the last address registered with the Ministry.

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Note that the defence of honest mistake of fact is not available where the suspension is automatic by operation of statute.

For issues regarding service of notice see also annotations to s.34.

- R. v. MacDougall, [1982] 2 S.C.R. 605 (S.C.C.); for full citation see Nature of Offence, *supra*
- R. v. Molis, [1980] 2 S.C.R. 356, 55 C.C.C. (2d) 558, 116 D.L.R. (3d) 291, 33 N.R. 41 (S.C.C.)
- R. v. Maclean (1974), 27 C.R.N.S. 31, 46 D.L.R. (3d) 564, 17 C.C.C. (2d) 84 (N.S. Co. Ct.)
- R. v. Robertson (1984), 30 M.V.R. 248, 43 C.R. (3d) 39 (Ont. Prov. Ct.)
- R. v. Potter (1978), 3 C.R. (3d) 154, 39 C.C.C. (2d) 538 (P.E.I.S.C.)
- R. v. Sangha (1984), 29 M.V.R. 28 (B.C. Co. Ct.)
- R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299 (S.C.C.); for full citation see table of cases.
- Proudman v. Dayman (1941), 67 C.L.R. 536 (Aus. H.C.)
- R. v. MacLellan (1983), 23 M.V.R. 236, 60 N.S.R. (2d) 426, 128 A.P.R. 426 (N.S.C.A.)
- R. v. McFerran (1983), 24 M.V.R. 303 (B.C. Co. Ct.)
- s.35 H.T.A.

Res Judicata: The cases conflict on whether a conviction for “drive motor vehicle — no licence” [s.18(1)] precludes a conviction for driving while under suspension [s.35]. In **R. v. Preeper** [1984, B.C. Prov. Ct.] the accused was stopped by the police and charged with driving without a licence. He paid the ticket out of court. Four months later an Information was sworn alleging, on the same facts, that he drove while under suspension. It was held that the act which underlies a “drive motor vehicle — no licence” charge is the same act that underlies a driving while under suspension charge and that the evil aimed at in the two offences is similar. As a result Mr. Preeper’s conviction on the lesser charge barred conviction on the suspended driving charge. It is submitted that this logic is incorrect in fact and has a shallow footing in policy. Driving without a licence is a purely regulatory offence. The policy is to permit only those persons with proven competence in driving skills to operate motor vehicles; it is also a fee enforcement proscription. The purpose of s.35 is to bar those drivers who have proven themselves a danger to the motoring public. Surely this second group of drivers is more dangerous — they are proven incompetents. If the penalties for these offences were similar it would make little difference which charge was laid. The penalties, however, reflect the Legislature’s intention to especially discourage disqualified drivers.

In **R. v. Moody** [1985, B.C. Co. Ct.] the **Preeper** case was referred to but not followed. The court chose, instead, to follow the unreported case of **R. v. Doro** [1984, B.C. Co. Ct.] with the result that the accused was convicted of suspended driving subsequent to his conviction for driving without a valid driver’s licence. The court held that the former charge had two necessary ingredients [suspension of driver’s licence and knowledge of that suspension] that the latter did not require, and further that “there is a difference between an included offence and two causes or matters that might arise out of a single event” [p. 202]. It was also held that such conviction did not offend s.11(h) of the **Charter**.

It is very easy for a suspended driver to truthfully say he doesn’t have his licence with him and, if the police computer is down, receive a small fine for failing to surrender licence [s.19(1)]. The **Preeper** holding would support the accused in this fraud. It is submitted that each case is to be decided on its own merits. The four month delay in the **Preeper** case may have justified the court’s finding. The **Doro** and **Moody** cases, however, should demonstrate the general rule that a voluntary out-of-court payment for a s.18(1) or 19(1) charge should not

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preclude conviction for a s.35 offence. In the event of a subsequent s.35 conviction the sentence should reflect the previous fine.

R. v. Preeper (1984), 28 M.V.R. 193 (B.C. Prov. Ct.)

R. v. Moody (1985), 33 M.V.R. 198 (B.C. Co. Ct.)

R. v. Doro (July 16, 1984), unreported (B.C. Co. Ct., New Westminster, Boyle Co. Ct. J.)

Manifestations: In *R. v. Azzoli* (1983), 24 M.V.R. 205 (Ont. Prov. Ct.) two issues were considered. The first was due diligence. It was held that the defendant's reliance on his secretary to "straighten out" his suspension notice with its corresponding fine amounted to a defence of due diligence. The defendant apparently gave (hearsay) evidence that his secretary phoned City Hall to find out about the fine, since he was out of town. He returned three weeks later and was stopped by police resulting in the s.35 charge. The next day he paid the fine himself. Montgomery, J. then continues with the second issue. He finds that the suspension notice (date of notice not given) which was received on 4th day of May, 1983, was very ambiguous. It stated that the defendant's driver's licence is suspended effective the 17th of May, 1983. Montgomery, J. found the following clauses to be offensive, "to reinstate your licence takes a minimum of 10 working days after your payment is processed by the court. Therefore, it is important that your payment be made immediately if you are to avoid suspension." His Honour found that to "avoid suspension" was ambiguous in light of the initial clause "your driver's licence is suspended effective 17th day of May." The ambiguity, so found was resolved in favour of the defendant and the charge dismissed.

Regarding the issue of ambiguity it is respectfully submitted that the message of the suspension is related with clarity. The document must have been dated before the date it was received (04 May). The effective date was 17 May. Therefore the defendant had at least 13 days to have the issue resolved. Because the reinstatement takes some time (10 working days) it is important that payment be made immediately if suspension is to be avoided. Read in its totality the document, it is respectfully submitted, is totally lacking in ambiguity.

Regarding the issue of the defendant's reasonable belief in a mistaken set of facts which if true would render the act or omission innocent, the defendant delegated his responsibility to exercise due diligence and he should reap the rewards and bear the losses of his delegation. The information regarding his secretary's call is apparently hearsay and without weight. The defendant did not verify with his secretary, or the Defaulted Fines Control Centre to see if in fact the situation was straightened out. His erroneous assumption that it was is not, respectfully, due diligence.

R. v. Ghany [(1983) 19 M.V.R. 169 (Ont. C.A.)] examined a provincial court finding of ambiguity similar to that in *R. v. Azzoli* (supra). In this case the wording of the suspension notice was "your driver's licence is suspended pursuant to the permit point system. . . . Effective 21 December 1981. . . ." The trial judge held that as the wording of the notice was in the present tense the requirements of s.7(1) of *O. Reg. 359/81* were not met and therefore the defendant was improperly suspended. The Ont. C.A. held that the notice was clearly in accord with s.19 of *O. Reg. 359/81* the purpose of which is to accommodate the licence holder such that his affairs can be arranged to allow for minimum inconvenience during the period of suspension.

Regarding period of suspension — does the clock start when the defendant mails in his licence — see s.185.

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Regarding probationary drivers with six-point demerit system see **O. Reg. 359/81** sections 8 - 13 inclusive and **O. Reg. 462**.

R. v. Azzoli (1983), 24 M.V.R. 205 (Ont. Prov. Ct.)

R. v. Ghany (1983), 19 M.V.R. 169 (Ont. C.A.)

Sentencing: Prior convictions for disqualified driving under s.238(3) [since repealed] of the **Criminal Code** are admissible for sentencing purposes regarding a provincial suspended driving offence. Section 242(4) [Code] convictions should likewise apply.

“It is important to bear in mind why a convicted person’s prior criminal record is put in evidence before the Court on sentencing. . . . It is, . . . to provide an indication as to whether . . . the accused is or is not entitled to leniency. It also assists the Court in appraising whether or not the accused is amenable to lenient treatment, his attitude to the law, the need for greater deterrence and the possibility of rehabilitation” [**R. v. Courchene**, 1983, Man. Prov. Ct.]

R. v. Courchene (1983), 25 M.V.R. 204, [1984] 1 W.W.R. 522 (Man. Prov. Ct.)

-s.35 H.T.A.

Unnecessary Noise

The mere production of unnecessary noise does not constitute an offence under the Act, and even though such noise is permitted by the operator, there is also no offence. There must be some positive act (or deliberate omission) on the part of the driver which produces the noise complained of.

R. v. Martin (1960), 126 C.C.C. 329 (Ont. H.C.)

-s.57(4) H.T.A.

Radar Warning Device Prohibited

The constitutional validity of s.52(a) [now s.61] was challenged and confirmed as intra vires the provincial legislature in **R. v. Boivin** [1978, Ont. H.C.J.].

Possession of a radar warning device that is, but for the absence of a fuse, functional is the mischief towards which this section is directed. The absence of a fuse will not result in a dismissal. [**R. v. Shuler**, 1983, Alta. C.A.]

A police officer, on a “hunch” resulting from an odd movement of the driver, opened the glove compartment and discovered a “fuzz-buster” radar detector. The driver made no objection. The officer’s search and seizure was held to be unreasonable, illegal and contrary to s.8 of the **Charter** as it was not based on reasonable and probable grounds. Nevertheless it was held, on appeal, that the search did not invade to any great degree the accused’s personal privacy and was done with no objection whatever nor was the constable aware that he was infringing the defendant’s rights. As a result the evidence was admitted as the conduct of the police was held not to be such as to shock the community, nor would the admission of the “fuzz-buster”, in the circumstances, bring the administration of justice into disrepute [**R. v. Fehr**, 1984, Man. Q.B.]

It may be necessary to call an electronics expert to prove that a specific device is “designed or intended for use in a motor vehicle to warn the driver of the presence of radar . . . [or] to interfere with the effective operation of speed measuring equipment” [s.61(1)]. In **R. v. Henuset** [1983, Man. Co. Ct.] a police officer seized and disconnected a two-piece device suspected to be a radar detector. He reassembled it and made several tests in another vehicle. He could not swear he had reassembled the device in the exact fashion he had discovered it in. The County Court Judge stated he was highly suspicious and suggested the accused was probably guilty but

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was not satisfied beyond a reasonable doubt that the seized equipment was a radar detection device.

R. v. Boivin (1978), 44 C.C.C. (2d) 348, 1 M.V.R. 44, 93 D.L.R. (3d) 557 (Ont. H.C.J.); leave to appeal by defendant dismissed

R. v. Shuler (1983) 21 M.V.R. 189, 26 Alta. L.R. (2d) 270, 46 A.R. 96 (Alta. C.A.)

R. v. Fehr (1984), 29 M.V.R. 63 (Man. Q.B.)

R. v. Henuset (1983), 20 M.V.R. 1, 20 Man. R. (2d) 330, [1983] 4 W.W.R. 267 (Man. Co. Ct.)

-s.61 H.T.A.

Safety Standards Certificates

Evidence of identification of a licensee authorized to issue safety standards certificates may be introduced by means of the certificate in question and the actual licence need not be formally produced [*R. v. Biluk*, 1981, Ont. Prov. Ct.].

In *R. v. Servacar Ltd.* [1983] the Ontario Court of Appeal considered the issue of the vicarious liability of the licensee for the failure of a motor vehicle inspection mechanic in his employ to properly inspect the vehicle. It was held that the Legislature had imposed a duty, on the licensee, to be satisfied that the mechanic found the vehicle to comply. The statutory duty was not broad enough to impose vicarious liability on the licensee. At the time *Servacar Ltd.*, was charged, section 74(3)(a) indicated that a S.S.C. shall not be issued unless, “(a) the vehicle has been inspected by a motor vehicle inspection mechanic . . . and the vehicle is found to comply. . . .”. The underlined portion has since been amended to read “. . . and the vehicle complies. . . .”. It is submitted that the Legislature has clearly manifested an intention to impose liability for improper inspections on both parties signing the S.S.C. The standard of compliance is no longer the subjective opinion of the inspecting mechanic; it is an objective standard and the licensee is now vicariously liable for the negligence of a mechanic conducting inspections under the authority of the licensee’s licence.

For the civil ramifications of a statutory breach see *Ali v. 301077 Ontario Ltd.*, [1984, Ont. Prov. Ct.].

R. v. Biluk (1981), 14 M.V.R. 53 (Ont. Prov. Ct.)

R. v. Servacar Ltd. (1983), 25 M.V.R. 83, 1 O.A.C. 95 (Ont. C.A.)

Ali v. 301077 Ontario Ltd. c.o.b. Mocar Motors (1984), 27 M.V.R. 95 (Ont. Prov. Ct.)

-s.74 H.T.A.

Motorcyclists to Wear Helmet

Mandatory helmet legislation is intra vires the legislative powers of Alberta [*R. v. Jones; R. v. Shannon*, 1980, Alta. Prov. Ct.]. In British Columbia it was held to be a strict liability offence [*R. v. Varga*, 1983, B.C.S.C.].

Compulsory helmet legislation does not contravene the right to security of the person [s.7, *Charter*]. Evidence that helmets cause (1) heat build-up resulting in fatigue and loss of co-ordination; (2) loss of peripheral vision; and (3) loss or attenuation of hearing, thereby increasing the likelihood of accidents and injuries was held to be limited and tenuous and outweighed by evidence of increased safety to wearers. There was nothing to prohibit the Legislature from limiting the degree of individual risk-taking upon public highways; such legislation is not, therefore, discriminatory [*R. v. Fisher et al.*, 1984, Man. Prov. Ct.].

R. v. Jones; R. v. Shannon (1980), 6 M.V.R. 308 (Alta. Prov. Ct.)

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R. v. Varga (1983), 24 M.V.R. 256 (B.C.S.C.)

R. v. Fisher et al. (1984), 29 M.V.R. 137, 42 C.R. (3d) 291 (Man. Prov. Ct.)

-s.88 H.T.A.

Load and Dimension Permits

The Crown must prove that the commercial vehicle stopped was in fact the commercial motor vehicle of which the defendant is alleged to be the owner, that is, the weighed vehicle was the same vehicle referred to in the registration permit. Failure to prove this essential element will result in a dismissal [**George Radford Construction Ltd. v. R.**, 1980, Ont. Co. Ct.].

George Radford Construction Ltd. v. R. (1980), 6 M.V.R. 295 (Ont. Co. Ct.)

-s.93(7) H.T.A.

Loading of Motor Vehicle Etc.

The carrier's responsibility under this section appears to be to secure the load — in this case a sealed drum of creosote which developed a leak in transit resulting in a spraying of vehicles following said transport truck — for the purposes of transport only. In this case the drum was securely fastened.

R. v. Bill Thompson Tpt. Ltd. (1973), 15 C.C.C. (2d) 574 (Ont. Prov. Ct.)

-s.94(2) H.T.A.

Weight

Although Parliament has exclusive authority pursuant to s.91, paragraph 17, of the **Constitution Act 1867** to enact legislation governing weights and measures the Provincial Legislature has exclusive authority to legislate in respect of vehicular weights [**R. v. J. W. Rehn Trucking**, 1981, Alta. Q.B.].

In **R. v. Lucas** [1983] the Nova Scotia Court of Appeal examined the abbreviated descriptions of various "overweight vehicle" offences as found in the regulations. Apparently these regulations indicated the wording "overweight vehicle" in relation to eight different offences each of which were proscribed by the same section of the **Motor Vehicle Act**. Mr. Lucas faced two different charges although the Informations did not reveal which of the eight possible charges were being pursued by the Crown. It was held that the failure to provide the accused with notice of the specific offence violated his s.11(a) **Charter** right to be so informed without unreasonable delay. As a result the charges were dismissed. Such a situation is unlikely to arise in respect of the twenty two [overweight vehicle] offences proscribed by ss.93 to 104 of the **H.T.A.** (Ontario). The abbreviated wordings suggested in **Regulation 817** of the **Provincial Offences Act** lists separate wordings and subsection numbers for each offence.

R. v. J. W. Rehn Trucking (1981), 11 M.V.R. 315 (Alta. Q.B.)

R. v. Lucas (1983), 6 C.C.C. (3d) 147, 21 M.V.R. 292, 57 N.S.R. (2d) 159, 120 A.P.R. 159, 150 D.L.R. (3d) 118 (N.S.C.A.)

-s.97 H.T.A.

Restrictions as to Weight on Tires

In Saskatchewan the offences of overweight on tires was held to be a strict liability offence. The statute was found to prohibit certain acts albeit not absolutely. The Legislature had recognized the necessity to permit some avenues of flexibility rather than an absolute standard. The

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potential severity of penalties also suggested the offence was one of strict rather than absolute responsibility [**R. v. Mannion Tpt. Ltd.**, 1985, Sask. Q.B.].

R. v. Mannion Tpt. Ltd. (1985), 31 M.V.R. 246, 38 Sask. R. 152 (Sask. Q.B.)
-s.98 H.T.A.

Maximum Allowable Axle Unit Weights

Sections 70 to 81 [now ss.97 to 108] proscribe absolute liability offences. A common law defence of necessity as well as one of commercial impossibility may be applicable [**R. v. Allen**, 1979, Ont. Dist. Ct.] but see also **Donline Haulage Inc. v. R.** [1980, Ont. Co. Ct.] which held that this offence is one of strict liability at least when it charges the owner pursuant to s.147(1) [now 181(1)]. See annotations to s.101(1)(a) and s.181(1).

R. v. Allen (1979), 59 C.C.C. (2d) 563, 3 M.V.R. 203 (Ont. Dist. Ct.)
Donline Haulage Inc. v. R. (1980), 4 M.V.R. 241 (Ont. Co. Ct.)
-s.99 H.T.A.

Maximum Allowable Gross Vehicle Weights

The case of **R. v. Laidlaw Transport Ltd.**, held after a meticulous application of the “**Sault Ste. Marie** procedure”, that this offence is one of strict liability such that a defence of “exercising all reasonable care” (due diligence) was applicable.

R. v. Laidlaw Transport Ltd. (1980), 4 M.V.R. 253 (Ont.Co.Ct.)
See also **Spacemaker Products Ltd. v. R.** (1980), 7 M.V.R. 265 (Ont.Co.Ct.)
-s.101 H.T.A.

Power of Officer to Have Load Weighed: Penalty

The New Brunswick provisions regarding weighing were held not to contain a prescription as to who decided whether stationary or portable scales were to be used. As a result the refusal of the accused to permit use of portable scales, as he was concerned with possible damage to his vehicle, was held not to violate the Act [**R. v. Morabito**, 1980, N.B.Q.B.].

R. v. Morabito (1980), 32 N.B.R. (2d) 590, 78 A.P.R. 590 (N.B.Q.B.)
-ss.105(1), (3) and (6) H.T.A.

Penalty

The words “and on conviction is liable to a fine of, . . .” are ambiguous as to whether the legislature intended to fix mandatory or maximum penalties. Such ambiguity is resolved in favour of the accused and the fines so listed are to be considered maximum fines except for the minimum fine of \$50 in 106(a).

Spacemaker Products Ltd. v. R. (1980), 7 M.V.R. 265 (Ont.Co.Ct.)
-s.106 H.T.A.

Rate of Speed

It is submitted that the offence of speeding is one of absolute liability at least in the sense that the defences normally associated with strict liability offences are not available. The principle that honest and reasonable mistake of fact is not a defence to a charge of speeding is expounded in many cases including: **R. v. Gillis** [1974, N.S.C.A.], **R. v. Rendall** [1974, Ont. Dist. Ct.], **R. v. Hickey** [1976, Ont. C.A.], **R. v. Lemieux** [1978, Que. C.A.] and **R. v. Harper** [1985, B.C. Co. Ct.]. In each of these cases the driver was relying in good faith on a defective speedometer but was nevertheless convicted. In **R. v. Naugler** [1981] the Court of Appeal in

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Nova Scotia emphatically stated that the offence of speeding created by s.96(2) of the **Motor Vehicle Act**, R.S.N.S. 1967, c.191, as amended, is one of absolute liability. It should however be pointed out that this section's legislative history is such that a previous statutory defence of "reasonable and prudent speeding" was deleted. The court approved of **Hickey**, **Lemieux** and **Gillis** (supra) in its judgment.

R. v. Gillis (1974), 18 C.C.C. (2d) 190 (N.S.C.A.)

R. v. Rendall (1974), 21 C.C.C. (2d) 253 (Ont. Dist. Ct.)

R. v. Hickey (1976), 13 O.R. (2d) 228, 30 C.C.C. (2d) 416, 70 D.L.R. (3d) 689 (Ont. C.A.)

R. v. Lemieux (1978), 41 C.C.C. (2d) 33 (Que. C.A.)

R. v. Harper (1985), 45 C.R. (3d) 186, 35 M.V.R. 134 (B.C. Co. Ct.)

R. v. Naugler (1981), 65 C.C.C. (2d) 25, 25 C.R. (3d) 392, 14 M.V.R. 9, 49 N.S.R. (2d) 677, 96 A.P.R. 677 (N.S.C.A.)

Common Law Defences: The Crown must always prove the *actus reus* and so a defence that the proscribed conduct was involuntary will succeed. In addition the defences of infancy, insanity, necessity, commercial impossibility, compulsion and duress if applicable to the instant case may be successful.

In **R. v. Kennedy** [1972, N.S. Co. Ct.] the late O'Hearn, Co. Ct. J. considered the application of the defence of necessity. He noted, in obiter dicta, that necessity was available in certain circumstances where the defendant can prove that it was necessary to break the law in order to avoid the harm and that avoiding the harm was a good proportionate to the good intended to be protected by the law. In that case the defendant's claim that he could not reduce his speed because he was being followed too closely by another vehicle was held to be insufficient to invoke the defence of necessity. The **Kennedy** case was noted in **R. v. Paul** [1973, N.S. Co. Ct.] where the court was of the opinion that the circumstances would have to be extremely exceptional and that a social worker's claim to be urgently required to assist in an unsanctioned drug investigation was not of that type. Both these cases pre-date **R. v. Sault Ste. Marie** [1978, S.C.C.]; as a result speeding was considered a strict liability offence. It may be that the availability of necessity can now be distinguished on the basis that speeding is absolute liability.

R. v. Kennedy (1972), 7 C.C.C. (2d) 42, 18 C.R.N.S. 80 (N.S. Co. Ct.)

R. v. Paul (1973), 12 C.C.C. (2d) 497 (N.S. Co. Ct.)

R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299 (S.C.C.); for full citation see Table of Cases.

Also see Glossary "Common Law Defences."

Mistake of Law: Mistake of law [such as acting upon one's misreading of a sign indicating speed limit 45 m.p.h. begins before reaching the sign] is not a defence to speeding.

R. v. Cunningham (1979), 45 C.C.C. (2d) 544 (Ont. Div. Ct.)

- (i) **Judicial Notice:** Judicial Notice shall be taken of speed limits published in the regulations. [**R. v. Bland**, 1974, Ont. C.A.]. The actual boundaries of a municipality are not so notorious that they can be entitled to judicial recognition in all circumstances [**R. v. Eagles**, 1976, Ont. H.C.]. However, one should not be required to prove the patently obvious. It is only necessary where there is some dispute or some possible disagreement about whether the location is within such an area [**R. v. Redlick**, 1978, Ont. S.C.]. In proper cases it is possible to take judicial notice of a location [**R. v. Bednarz**, 1961, Ont. C.A.].

R. v. Bland (1974), 20 C.C.C. (2d) 332 (Ont. C.A.)

R. v. Eagles (1976), 31 C.C.C. (2d) 417 (Ont. H.C.)

R. v. Redlick (1978), 41 C.C.C. (2d) 358, 2 C.R. (3d) 380 (Ont. H.C.)

R. v. Bednarz (1961), 130 C.C.C. 398, 35 C.R. 177 (Ont. C.A.)

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Pacing: The Ontario Court of Appeal held, in **Bland** (supra.) that evidence of a police speedometer reading of 95 m.p.h. is prima facie evidence of the offence of driving at 90 m.p.h.

Also see *Nicholas v. Penny*, [1950] 2 K.B. 466 (C.A.)

R. v. Amyot, [1968] 4 C.C.C. 58 (Ont. Co. Ct.)

R. Ex. Rel. Neely v. Tait, [1965] 1 C.C.C. 16 (N.B. Co.Ct.)

Obstruct Police: It would appear that if, in fact, warning motorists approaching a police “radar trap” is an offence, those persons so warned must be in violation of the **H.T.A.** such that the police officer is indeed “obstructed”.

R. v. Solowoniuk (1960), 129 C.C.C. 273 (B.C.C.A.)

-s.118 C.C.C.

Signs: The burden is on the accused to show that signs actually erected have not been erected in accordance with the regulations; that is, speed limit signs are prima facie evidence of the existence of the speed limit and the particular bylaw need not be proved unless put in issue by the defence.

R. v. Clark (1974), 18 C.C.C. (2d) 52 (Ont. C.A.)

Radar: It is crystal clear that a radar device, if tested to determine accuracy and if used properly, is prima facie evidence of the vehicle’s speed. The onus is on the accused to raise a reasonable doubt as to the accuracy of the radar device or its testing apparatus.

R. v. Grainger (1958), 120 C.C.C. 321 (Ont. C.A.)

R. v. Lafrentz, [1970] 2 C.C.C. 381 (Sask. Q.B.)

R. v. Morash (1972), 10 C.C.C. (2d) 39 (N.S. Co. Ct.)

If suitable answers are given the following checklist assures compliance with the case law regarding radar devices.

- (i) Automatic test completed
- * (ii) Calibrated tuning fork tests completed
- (iii) Time of tests — before and after occurrence
- (iv) Were the tests conducted by officer the approved tests for the radar device in question
- (v) Was the device in good working order and capable of registering accurate speed readings
- (vi) In the officer’s opinion did it do so on the date in question in reference to the defendant’s vehicle
- (vii) What is the officer’s training and experience
 - (a) with radar devices generally
 - (b) with the model in question
- (viii) Did the officer visually observe the target vehicle and form an opinion of its speed in relation to the speed limit — if so — was this opinion confirmed by the radar reading
- (ix) Obstructions: (a) if the selector switch was in the conventional moving radar mode were there any vehicles moving in the opposite direction to the patrol car, or (b) if the selector switch was in the parallel operation mode were there any vehicles moving in the same direction as the patrol car, or (c) if the selector switch was in the

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stationary mode were there any other vehicles in the radar range

*NOTE that in **R. v. Bourque** [1985, Alta. Q.B.], it was held that the accuracy of the tuning fork(s) must be proved beyond a reasonable doubt, presumably by a Certificate of Accuracy. It would seem beyond coincidence that a tuning fork, calibrated to produce a certain reading [and stamped or engraved with that reading] could be inaccurate to the exact extent of a corresponding inaccuracy in the radar device being tested. It is submitted that testimony indicating that the radar was tested with tuning forks supplied by the manufacturer is proof beyond a reasonable doubt of the accuracy of both the tuning fork and the radar device especially where the tuning fork is stamped or engraved with a number corresponding to the reading it is calibrated to produce.

R. v. Bourque (1985), 38 M.V.R. 110 (Alta. Q.B.)

R. v. Granger, *supra*

R. v. Lafrentz, *supra*

R. v. Morash, *supra*

Lawless v. R. (1981), 11 M.V.R. 296, 33 Nfld. & P.E.I.R. 436, 93 A.P.R. 436 (P.E.I.S.C.)

R. v. Waschuk (1970), 1 C.C.C. (2d) 463 (Sask. Q.B.)

R. v. O'Reilly (1979), 10 Alta. L.R. (2d) 199, 3 M.V.R. 228, 16 A.R. 369 (Alta. Dist. Ct.)

R. v. Lehane (1982), 15 M.V.R. 160 (Alta. Q.B.)

R. v. Werenka (1981), 11 M.V.R. 280 (Alta. Q.B.)

It is not necessary for the operator to be an expert in the field of electronics; the officer need only indicate his training and experience and answer the questions above [**R. v. Martin**, 1984, Sask. Q.B.; **Lawless v. R.**, 1981, P.E.I.S.C.].

R. v. Martin (1984), 34 Sask. R. 299 (Sask. Q.B.)

Lawless v. R., *supra*

- (i) **Judicial Notice:** Judicial notice should relate only to facts which are known to intelligent persons generally and, as a result, such notice should not be taken as to what makes a radar machine work [**R. v. Waschuk**]. Judicial notice was taken of the use of radar guns but not of their exact operation in **Giffin v. R.** [1980, N.S. Co. Ct.]. In that case the Crown's evidence had not referred to the fact that the radar device was capable of recording target speeds; this was remedied by judicial notice.

R. v. Waschuk, *supra*

Giffin v. R. (1980), 8 M.V.R. 313, 46 N.S.R. (2d) 541, 89 A.P.R. 541 (N.S. Co. Ct.)

Charter: An absolute liability offence that does not have imprisonment as a penalty option is not contrary to s.7 or 11(d) of the **Charter**. Speeding is such an offence and it should not be re-categorized simply to protect it from the **Charter**. The test of s.7 validity expounded in **Ref. Re s.94(2) of the Motor Vehicle Act (B.C.)** [1985, S.C.C.], i.e., that absolute liability and imprisonment do not mix, does not put speeding offences in issue as to constitutional validity [**R. v. Harper**, 1985, B.C. Co. Ct.].

Ref. Re s.94(2) of the Motor Vehicle Act (B.C.) (1985), 23 C.C.C. (3d) 289, 48 C.R. (3d) 290, 36 M.V.R. 240 (S.C.C.)

R. v. Harper (1985), 45 C.R. (3d) 186, 35 M.V.R. 134 (B.C. Co. Ct.)

Careless Driving:

Nature of the Offence: It is submitted that s.111 proscribes a strict liability offence of driving on a highway in an inadvertently negligent manner.

The Advertent/Inadvertent Distinction: The aspect of inadvertence is expounded upon in

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O'Grady v. Sparling (1960) and **Mann v. R.** (1966) where the S.C.C. examines the validity of the Manitoba and Ontario offences of careless driving as compared with the **Criminal Code** sections pertaining to criminal negligence and dangerous driving respectively. In both decisions the **Criminal Code** sections were held to be concerned exclusively with advertent negligence while the careless driving provisions dealt with inadvertent negligence. It would seem, however, that "everyone who drives contrary to the provisions of the code is driving (contrary to the careless driving section of **The Motor Vehicle Act**) but I do not consider the converse is necessarily the case." (Mr. Justice Ritchie in **Mann v. R.**).

Regarding Strict Liability: On page 1316 (S.C.R.) of the **Sault Ste. Marie** judgment (1976) (S.C.C.) Dickson, J. (as he then was) makes favourable reference to the Ontario Court of Appeal decision in **R. v. McIver** (1965) where MacKay, J.A., held that careless driving was a strict liability offence capable of embracing a defence of due diligence. Also see **R. v. Johnson** (1983) (N.B.R.) in paragraph [13] where Deschenes, J., held careless driving to be a strict liability offence. Against these cases is a 1953 Sask. Police Court case (**R. v. Lucki**) which held that careless driving is a mens rea offence.

The Test or Standard of Conduct: The offence is "driving carelessly" which may be done in one of two ways: without due care and attention or without reasonable consideration for other persons using the highway. **R. v. MacKenzie** (1956) (O.H.C.)

The standard of skill and care to be applied is not that of perfection. The use of the term "due care", which means the care owing in the circumstances, makes it clear that, while the legal standard of care remains the same, in the sense that it is always what the ordinary prudent men (sic) would do in the circumstances, the factual standard is constantly shifting, depending on road visibility, weather conditions, traffic conditions that exist or may reasonably be expected, and any other conditions that an ordinary prudent driver would take into consideration. The standard is any objective one, fixed in relation to the other users of the highway, and in no way related to the degree of proficiency or experience attained by the individual driver whose conduct is in question. The test, where an accident has occurred, is not whether, if the accused had used greater care or skill, the accident would not have happened [**R. v. Beauchamp** (1953) (Ont. C.A.)].

In **R. v. Skowronneck** (1980) (Sask. Dist. Ct.), a rally car driver was convicted of careless driving where it was held that the test is an objective standard of care and attention not related to the degree of proficiency or experience of the particular accused.

Deserving of Punishment: The problem arises when the **Beauchamp** qualification that "the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment" is added to the above standard. This position was also propounded by the Ont. C.A. in **R. v. Wilson** (1971) where it was held that mere inadvertent negligence, whether of the slightest type or not, will not necessarily sustain a conviction for careless driving. Also on this point an Ontario County Court (**R. v. Namink**, 1979) stated that mere momentary inattention or a simple kind of error of judgment is not sufficient for conviction. In Nova Scotia County Court, Judge O'Hearn held that the burden of proof, regarding Nova Scotia's offence of careless driving, was the same as the burden in criminal cases [**R. v. Gooding** (1979)].

It is to be noted however, that s.90(1) of the **M.V.A.** (R.S.N.S.) imposes a positive duty of care and prudence upon drivers: it does not merely forbid negligence but requires careful and prudent driving.

Against these cases lies the 1964 holding of the B.C.C.A. [**R. v. Jacobsen**] which, after examining the advertence/inadvertence distinction, concludes that "inadvertent negligence

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denotes no more than absence of thought, of due care and attention, the failure to observe which is an offence per se, excluding the considerations that the conduct must constitute a breach of duty to the public and be deserving of punishment in a criminal way". Although the logic of this judgment is flawless, the application of its principle is less straight forward, at least in the Ontario context. It is submitted that the standard from which deviance determines negligence (advertent or inadvertent) is the legal standard of what the ordinary prudent driver would do in the circumstances [**R. v. Beauchamp**]. Only when this factual ascertainment is made can the trier of fact determine what actions constitute negligence. At this point application of the **Jacobsen** principle is valid.

Danger to the Public: The P.E.I.S.C. has held that the existence of actual or potential danger to the public is entirely extraneous and irrelevant to the offence; [**R. v. Smallman**, 1964].

Proof Required in Single Vehicle M.V.A.'s: Because this is a strict liability offence the Crown must only prove that the accused committed the prohibited act; he will then be convicted unless he can prove the act was done without negligence or fault on his part. The onus (on the accused) need meet only the standard of proof of reasonable probability. (**R. v. McIver**, 1965, Ont. C.A.). In a single car M.V.A. the Crown must prove more than the fact that there was an accident; see also **R. v. Ashton** [1985, Ont. Dist. Ct.].

Res Ipsa Loquitur: The civil doctrine of res ipsa loquitur (the thing speaks for itself) was held not to apply to criminal or quasi-criminal cases in **R. v. Smith** (1961) (B.C.Co. Ct.). This principle is really just a fine tuning of the rule in **Hodge's Case** which, of course, applies to all circumstantial evidence. (See Glossary). The B.C.C.A. [**R. v. Johnson**, 1966] held that in the absence of any evidence whatsoever of facts or circumstances basic to causation or significance of the fact of the skid off the road, the only inference that could be drawn was that the brakes were applied while the car was proceeding along the road; such a circumstance did not, of itself, involve any failure to drive with due care and attention. In that case the car skidded 61 feet, leaving the road, rolled and ended up astride a one foot high retaining wall 30 feet north of the avenue. It was held that this evidence alone did not establish a prima facie case. In the very early hours of August 4, 1967, in London, Ontario, a trail of skid marks 211 feet long led to a lamp post where a single vehicle was "written off." The magistrate explained that the application of brakes by itself prima facie suggests the presence rather than the absence of care and control. He dismissed the charge of careless driving without hearing any defence evidence [**R. v. Buchanan**]. In a remarkably similar situation however, County Court Judge Kennedy held that the evidence was not only consistent with the conclusion that the accused committed the offence but also was inconsistent with any other rational conclusion [**R. v. Ayotte**, 1962].

Method of Proof: An accumulation of actions none of which demonstrate the requisite fault in isolation may, when viewed as a whole, point to careless driving [**R. v. Marceau**, 1978, Que. S.C.]. In that case speeding for a long distance, passing cars improperly and going through a stop sign culminated in a conviction. (See also **R. v. McDorman** in "Manifestations" infra).

Included Offences: An included offence possesses some but not all the elements of the greater offence, so that if the whole offence charged cannot be committed without committing another offence, the latter is not included. Speeding is not an included offence of careless driving [**R. v. Carey**, 1983, Man.C.A.]. It may not be determined by a court that the attainment of a certain rate of speed (presumably predetermined) on a highway thereby constitutes careless driving [**R. v. Yolles**, 1959, O.C.A.].

Autrefois: The 1982 decision of the N.S.S.C. in **R. v. Anthony** provides an excellent review of the case law regarding dangerous driving, criminal negligence and careless driving. That court

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held that dangerous driving and careless driving are not included offences so that a conviction or acquittal on one is not a bar to a prosecution on the other through the operation of the special pleas of autrefois acquit, autrefois convict, or the common law defence of res judicata. In that case the Crown withdrew the careless driving information after plea and then the accused was arraigned on the dangerous driving charge.

Owner's Liability: The current s.181(2) H.T.A. statutorily asserts that an owner, unless he is also the driver, shall not be liable in a careless driving charge.

Rear End Collisions: The fact that a rear end collision has occurred is by itself insufficient evidence to support a conviction of careless driving [*Simoneau v. The King*, 1951, Ont. Dist. Ct.].

Definitions:

(i) Highway: Highway, as defined in s.1(1)14 is restricted and does not include a sidewalk; therefore where the accused drove his vehicle on the sidewalk, because the road was under construction, he could not be guilty of careless driving [*R. v. Wall*, 1968, Ont. Mag. Ct.].

Manifestations:

F: J. driving normal speed — suddenly cigarette ember falls on seat and burns hole. J. responds to emergency situation by quickly extinguishing — in the process he crosses centre line — result M.V.A.

H: J. reacted to emergency which could not have been foreseen — resulting in involuntary lane change — acquittal.

R. v. Johnson (1983) (N.B.Q.B.) (Excellent review of case law.)

F: Appealed regarding a question of duplicity.

H: The gist of the offence is improper driving which may be manifested by recklessness on the part of the driver, negligence or a speed incompatible with public safety, or any other disregard of the public — conviction.

R. v. Rousseau (1938) (O.C.A.)

F: Professional truck driver (1) driving 30 hours without sleep, (2) failed to attend to air leak in brake system (took temporary corrective measures but did not stop to have repaired properly), (3) failed to adjust slack-adjusters as part of a pre-trip inspection, (4) failure to see two truck route signs — result: multi-vehicle M.V.A. due to brake failure.

H: While it may be that failure (2) alone would suffice to convict for careless driving, it is the defendant's conduct as a whole which must be examined — conviction.

R. v. McDorman (1983) (B.C. Prov. Ct.)

F: While driving his car W. had a fainting spell resulting in a M.V.A. W. had suffered such spells since infancy, though less frequently as he grew older.

H: In light of the evidence that W. knew at all times that there was a possibility that he might suffer a fainting attack — conviction.

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R. v. Wolff (1966) (Sask. Mag. Ct.)

F: While driving on a fairly busy road on a dark night J. pulled over onto the wrong side and stopped, without getting out of his car, to check his mailbox. An approaching vehicle crested over a hill in front of J. and, seeing J's headlights kept to J's left resulting in a M.V.C. with the mailboxes and J's auto.

H: The bringing of an automobile to a stop, (for some temporary purpose), is "driving". In these circumstances it is careless driving — conviction.

R. v. Jacobs (1955) (B.C.C.A.)

F: S. accelerated to 30 m.p.h. (speed limit) at a painted crosswalk (although not signed) without a clear view — passing other motor vehicles (3 lane — oneway traffic) — looked at driver of auto he was just passing — struck a pedestrian — S. was a native of this town and knew the area well.

H: Conviction — careless driving

R. v. Schoemaker (1979) (Ont. Co.Ct.)

F: R. passing several vehicles at a time at high speed on curves and solid double lines culminating in a rear end M.V.A. with a car turning left.

H: Conviction — careless driving.

R. v. Rogers (1981) (N.B.Q.B.)

F: Accused and three friends on late night motorcycle ride. The two passengers dismounted and the accused and the driver left scene temporarily. Upon their return the two drivers encountered the two former passengers wrestling in the middle of the road. The accused was in the lead and struck the two persons lying on the road; one was killed the other injured. No skid marks discovered. Mild use of drugs evident in blood sample.

H: There was no evidence which supported an inference of careless driving. Persons lying in roadway not a foreseeable circumstance. Traces of alcohol and marihuana in defendant's blood not sufficient to support an inference that his ability to drive with care was impaired. Licence restriction to daytime driving not logically connected to careless driving charge. Absence of skid marks more consistent with not being able to see persons on roadway [?]. Held: insufficient evidence.

R. v. Ashton [1985, Ont. Dist. Ct.]

Cases referred to:

R. v. Anthony (1982), 16 M.V.R. 160, 52 N.S.R. (2d) 456, 69 C.C.C. (2d) 424, 106 A.P.R. 456 (N.S.C.A.)

R. v. Ashton (1985), 36 M.V.R. 100 (Ont. Dist. Ct.)

R. v. Ayotte (1961), 37 C.R. 28 (Ont. Co. Ct.)

R. v. Beauchamp, [1953] O.R. 422, [1953] 4 D.L.R. 340, 16 C.R. 270 (Ont. C.A.)

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- R. v. Buchanan (1967), 10 Crim. L.Q. 246 (Ont. Mag. Ct.)
 R. v. Carey, [1973] 2 W.W.R. 267, 10 C.C.C. (2d) 330 (Man.C.A.)
 R. v. Gooding (1977), 33 N.S.R. (2d) 98, 57 A.P.R. (2d) 98 (N.S. Co. Ct.)
 R. v. Jacobs (1955), 22 C.R. 154, 16 W.W.R. 126, 113 C.C.C. 73 (B.C.C.A.)
 R. v. Jacobsen (1964), 48 W.W.R. 272, 44 C.R. 24 (B.C.C.A.)
 R. v. Johnson (1966), 58 W.W.R. 490 (B.C.C.A.)
 R. v. Johnson (1983), 45 N.B.R. (2d) 371, 118 A.P.R. 371 (N.B.Q.B.)
 R. v. Lucki (1955), 17 W.W.R. 446 (Sask. Police Ct.)
 R. v. MacKenzie, [1956] O.W.N. 35 (O.H.C.)
 Mann v. R., [1966] S.C.R. 238, 47 C.R. 400, 56 D.L.R. (2d) 1, [1966] 2 C.C.C. 273 (S.C.C.)
 R. v. Marceau (1978), 2 M.V.R. 202 (Que. S.C.)
 R. v. McDorman (1983), 23 M.V.R. 165 (B.C. Prov. Ct.); aff'd., (1984) 27 M.V.R. 37 (B.C. Co. Ct.)
 R. v. McIver, [1965] 2 O.R. 475, 45 C.R. 401, [1965] 4 C.C.C. 182 (O.C.A.), affirmed [1966] S.C.R. 254 (S.C.C.)
 R. v. Namink (1979), 27 Chitty's L.J. 289 (Ont. Co. Ct.)
 O'Grady v. Sparling, [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 24 D.L.R. (2d) 145 (S.C.C.)
 R. v. Rogers (1981), 34 N.B.R. (2d) 353, 85 A.P.R. 357 (N.B.Q.B.)
 R. v. Rousseau, [1938] O.R. 472, [1938] 3 D.L.R. 574 (Ont. C.A.)
 R. v. Corp. of City of Sault Ste. Marie (1976), 30 C.C.C. (2d) 257, 13 O.R. (2d) 113, 70 D.L.R. (3d) 430, affirmed [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 21 N.R. 295, 7 C.E.L.R. 53 (S.C.C.)
 R. v. Schoemaker (1979), 2 M.V.R. 27 (Ont. Co. Ct.)
 Simoneau v. The King (1951), 102 C.C.C. 282 (Ont. Dist. Ct.)
 Skowronnek v. R. (1980), 9 M.V.R. 36 (Sask. Dist. Ct.)
 Smallman v. R., (1964), 49 M.P.R. 23, [1964] 1 C.C.C. 340 (P.E.I.S.C.)
 R. v. Smith (1961), 130 C.C.C. 177 (B.C. Co. Ct.)
 R. v. Wall (1968), 11 Cr. L.Q. 223 (Ont. Mag. Ct.)
 R. v. Wilson, [1971] 1 O.R. 349, 1 C.C.C. (2d) 466 (Ont. C.A.)
 R. v. Wollf (1966), 57 W.W.R. 702 (Sask. Mag. Ct.)
 R. v. Yolles, [1959] O.R. 206, 19 D.L.R. (2d) 19 (Ont. C.A.)
 -s.111 H.T.A.

Direction of Traffic by Constable

Mens rea is not a necessary ingredient of the offence, and it is not necessary to prove that the accused in fact saw the signal. The signal, however, must be in such a manner that a reasonable person exercising due care and attention would see and obey it and interpret it to mean only one thing.

R. v. Harms, [1967] 3 C.C.C. 93 (Sask. Prov. Ct.)

The use of a flashing red light of itself on a public highway clearly denotes at the least caution, in every situation an element of danger, and at the most when coupled with other factors, a clear direction to stop.

R. v. Walker (1982), 17 M.V.R. 154 (Sask. Prov. Ct.)

A charge of failing to obey a signal to stop based on the defendant's conduct prior to the commencement of pursuit was held to be a separate act or matter or "delict" from the charge of dangerous driving which arose from a separate factual situation (the pursuit which occurred after he failed to stop). The application of the principle of res judicata as enunciated in **R. v.**

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Kienapple was therefore precluded.

Ueffing v. The Queen (1980), 7 M.V.R. 155 (N.S.S.C. A.D.)

R. v. Kienapple, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 (S.C.C.)

-s.114 H.T.A.

Stop at Through Highway:

The Stop Sign: A stop sign must be erected so as to reasonably indicate to people using the road that they are required to stop. A sign that has been turned so that it fails to do so (in this case the sign was turned 90 degrees) is no longer a stop sign within the meaning of said section.

Kraft v. Prefontaine (1963), 41 W.W.R. 510 (Sask. C.A.)

However, in **R. v. Priest** [[1961] O.W.N. 166, 35 C.R. 32 (C.A.)] the Ont. C.A. held that a stop sign that complies, though not strictly, but so substantially, with the regulations as to reasonably indicate that it is authoratative and erected by the competent authority . . . is equally binding on the driver, provided that he could have seen it if he was keeping a proper lookout. Only if the sign was not in strict compliance (in this case 6 inches too high and 6 inches too far from the curb) would the court consider the question of whether the stop sign was seen (otherwise it is irrelevant whether the driver saw the sign or not). When a constable gives in evidence that a “stop sign” was erected on location, the Crown has established a prima facie case. The onus is then on the defence to prove that in fact the sign does not comply with the regulations.

R. v. Lavelle (1958), 29 C.R. 156, 122 C.C.C. 111 (Ont. H.C.)

It is not incumbent on the Crown to prove the bylaw or regulation authorizing the erection of the stop sign.

R. v. Ross, [1966] 2 O.R. 273, [1966] 4 C.C.C. 175 (C.A.)

Duty to Stop: s. 116 proscribes an absolute liability offence. Such was the holding where a police officer responding to a hold up alarm was convicted for failing to stop.

R. v. Walker (1979), 5 M.V.R. 114, 48 C.C.C. (2d) 126 (Ont.Co.Ct.)

In examining the corresponding section of the **M.V.A.** (N.B.), which is not very dissimilar to the Ont. **H.T.A.**, a County Court Judge held that there was nothing in the section that requires one to stop at the stop sign; and further that the stop sign is notice and requirement for the driver to stop at certain places listed in the section. (i.e., stop line, crosswalk or immediately before entering the intersection — in the Ont. **H.T.A.** context)

R. v. Bannister, [1964] 2 C.C.C. 299 (N.B. Co. Ct.)

Further Duty to Yield: In **Ethier v. Insley** [(1970), 11 C.R.N.S. 222 (Ont. Co. Ct.)] it was held that s.64(b) — now s.116(1)(a) and (b) contains only one offence — that is “fail to yield”. The wording “may proceed with caution” is permissive and does not proscribe any separate offence. However, the Ontario Court of Appeal has held that s.64(b) (now s.116(1) and (2)) delineates two offences; fail to yield to traffic on through highway and traffic on through highway — fail to yield. Quite obviously these two offences are directed toward different drivers.

R. v. Durnford, [1971] 1 O.R. 657, [1971] 2 C.C.C. 116 (Ont. C.A.)

It would appear that the 1984 amendments of Bill 45 will resolve the difficulty.

-s.116(1) H.T.A.

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Yield Right of Way Signs

After observing that “if one failed, in the case of stop signs, to yield to traffic approaching as to constitute a hazard, then he is to blame” County Court Judge Pottier related that “the only difference between a stop sign and a yield sign is one of approach and entry of intersection.”

Hammond v. Smith (1964), 45 D.L.R. (2d) 762 (N.S. Co.Ct.)

It would also appear to be determined in that same case that failing to see the approaching vehicle, which defined the immediate hazard, is no excuse. In **R. v. Horban** [(1959), 31 W.W.R. 139 (Alta. Dist. Ct.)] it was held: a “yield right-of-way” sign cannot be disregarded by a vehicle subject to it because a vehicle having the right of way to be yielded to is travelling at an excessive speed, or is otherwise breaking the law.

-s.118(1) H.T.A.

Right of Way on Entering Highway from Private Road

Note the effect of the 1984 amendments of Bill 45 in that no longer must the driver in this position yield to “all traffic approaching on the highway” but now he must yield to “all traffic approaching on the highway so closely that to enter would constitute an immediate hazard”. Also note that the words “about to enter or cross” which have generated much case law, [**R. v. Perry** (1941), 77 C.C.C. 103 [(N.B. Co. Ct.), **R. v. Hornstein** (1973), 11 C.C.C. (2d) 197 (Ont. Prov. Ct.), **R. v. Langille** (1980), 31 N.B.R. (2d) 355, 75 A.R. 355, 7 M.V.R. 294 (C.A.)] have been replaced by “every driver or street car operator entering a highway. . . .” It is submitted that the new wording extends the “entering” driver’s duty to yield until he has ceased to enter and is therefore 100% on the highway. This statutory change has the effect of negating the ratios of **R. v. Perry** and **R. v. Langille**. The holding in **R. v. Hornstein** which was in opposition to these two cases would appear to have gained legislative recognition; the duty of the “entering” driver does not end until his vehicle is safely on the highway.

-s.119(1) H.T.A.

Pedestrian Crossovers:

Proof of Bylaw: The Ont. C.A. held: although it is necessary (for the Crown) to prove the existence of the Bylaw designating a crossover, the evidentiary burden may be satisfied by inference from evidence of the existence of such a crossover indicated by signs and markings of the kind that are commonly used with pedestrian crossovers in the province.

R. v. McLaren (1981), 10 M.V.R. 42 (Ont. C.A.)

See also 1984 amendment Bill 45 regarding addition of ss.(5).

-s.120 H.T.A.

Right Turns at Intersection

Note that the driver or operator is turning into an intersecting highway. S.1(1)14 defines highway to include driveways if intended for or used by the general public — i.e., that portion of the driveway at its mouth that is on public property.

-s.121(2) H.T.A.

Left Turn Across Path of Approaching Vehicle

When a driver finds himself turning left across two or more lanes of approaching traffic and his view of one or more of the approaching lanes is obstructed by another vehicle turning left

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from one of the approaching lanes the driver has no business in crossing “approaching” lane(s) without first ascertaining that there is no traffic approaching.

R. v. McPherson, [1966] 2 C.C.C. 385 (B.C.S.C.)

Absence of lookout and care by a driver turning left cannot be overcome by flashing his signal light.

Mattie v. Delory (1974), 19 N.S.R. (2d) 451 (N.S.S.C.)

-s.121(4) H.T.A.

Left Turn at Intersection

In *R. v. Harding*, [[1971] 1 O.R. 699, 2 C.C.C. (2d) 341 (Co. Ct.)] it was held that “as closely as practicable” to the centre line should be interpreted to mean “what is reasonable under the circumstances”. In that case a left turn was made from other than the left turn lane of one of two four lane highways. The driver’s excuse was that the turning lane was full and not wanting to block the adjacent lane made his left turn from the “straight through” lane (this was not a designated turn lane as in ss.(6)). With the addition in Bill 45 (1984) of ss.(7) which extends this principle to long vehicles only it could be argued that the principle is no longer available to regular vehicles.

-s.121(5) H.T.A.

Signal for Left or Right Turn

The duty in s.122 is not discharged where a driver signals his intention to turn simultaneously with starting the turn. There is a further duty to ensure that the manoeuvre can be made in reasonable safety.

Guimont v. Williston (1980), 30 N.B.R. (2d) 178, 70 A.P.R. 178 (N.B.C.A.)

The first requirement of s.122(1), “shall first see that such movement can be made in safety”, is not discharged by a mere glance in the rear view mirror when in fact another vehicle is attempting to pass and is in the first driver’s “blind spot”.

Johnson v. Hillborn, [1932] 1 D.L.R. 683, 4 M.P.R. 262 (N.S.C.A.)

In *R. v. Lebedorf*, [1963] 2 C.C.C. 95, [1962] O.W.N. 233 (Ont. H.C.) it was held that the duties imposed by s.69(1) [now s.122(1)] on a driver making a left (or right) turn, to see that such turn can be made in safety and to give a signal to a driver or drivers who may be affected by such turn, are separate and distinct and a charge which includes both in one count is void for duplicity.

-s.122(1) H.T.A.

U-turns Prohibited

To constitute an offence the prohibited u-turn must be made on the highway. A conviction was quashed where one third of the turn was actually made on a parking lot adjoining the highway.

Dahle v. The Queen (1983), 19 M.V.R. 262 (Nfld. Dist. Ct.)

-s.123 H.T.A.

Red Light — Fail to Stop

The offence of failing to stop at a red light . . . fits into category two (strict liability) as set

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out by Dickson, J. in **R. v. Sault Ste. Marie**. It is open to the accused to avoid liability by proving that he took all reasonable care.

R. v. Hammond (1978), 1 M.V.R. 210 (Ont. Co. Ct.)

NOTE: that this case involves a police officer attempting to utilize the exception in s.124(18).

-s.124(16) H.T.A.

Amber Light — Fail to Stop

This particular section grants to the motorist a discretion as to whether it is safe to stop or not. The court will decide on the facts, if that discretion was exercised properly. The motorist is not obliged nor is there a duty upon him to ascertain how long the light has been green and therefore to be able to know when the yellow light will become visible.

R. v. Harrington (1977), 3 B.C.L.R. 217 (Co. Ct.)

-s.124(13) H.T.A.

Flashing Red Light — Fail to Stop

A flashing red light is the equivalent of a stop sign . . . The general tendency of the courts (in Nova Scotia) would appear to be to treat (such) offences as cases of strict liability. In this case, the operating cause of the defendant sliding through the intersection was the unexpected presence of gravel at a point where he was expected to brake (at the bottom of a hill). As a result he was acquitted.

R. v. Comeau (1978), 42 N.S.R. (2d) 420, 77 A.P.R. 420 (Co. Ct.)

-s.124(19) H.T.A.

Erection of Signal Lights

The fact that traffic lights are in operation at an intersection is prima facie evidence that they have been installed in compliance with all statutory or regulatory requirements. Where traffic lights are in operation at an intersection a driver is bound to obey them whether or not installed in strict compliance with any regulatory requirements, unless it be shown that owing to deviation from those requirements the lights could not have been seen by him if keeping a proper lookout.

R. v. Potapchuk, [1963] 1 O.R. 40 (Ont. H.C.)

-ss.124(28) and (29) H.T.A.

Fail to Share Half Roadway — Meeting Vehicle

Roadway Defined: s.1(1) par. 32 defines roadway. That definition was refined in **Cetinski v. Forman** where it was held that the paved portion of the road distinguished by the yellow line was the shoulder of the road. See also s.130(3). In **Trinidad Leaseholdings v. Gordon** it was held that where only a portion of the roadway is ploughed clear of snow, "centre of the road" means the centre of the road currently prepared for travel by vehicles, but does not include any portion of the shoulder.

Nature of the Offence: Two early cases **R. v. Lucki** (1955) and **R. v. Patterson** (1964) held that this offence was one requiring mens rea. Each of these magistrate's court decisions was specifically overruled by higher courts in their own jurisdictions; **Lucki** by **R. v. Wehage** and **Patterson** by **R. v. McIver**. The leading S.C.C. case is **Gauthier & Co. v. R.** the principles of which are concisely related in **MacInnis v. Bolduc et al.** — where vehicles coming from opposite directions collide by reason of one of the vehicles skidding on the slippery pavement and it appears that this vehicle was partly over the centre line of the highway, the latter fact establishes prima facie

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proof of negligence which is not rebutted by a neutral fact such as skidding which may be as consistent with negligence as with no negligence. The burden on the driver of the skidding vehicle requires him to show a way in which the accident may have happened without negligence. Both **Bauthier** and **MacInnis v. Bolduc** are civil cases using a balance of probabilities test regarding due diligence as a defence. In this respect their holdings are similar to a finding that the offence is one of strict liability. Regarding due diligence **R. v. Gauthier** holds that if roads are in such a condition that a motor car cannot safely proceed at all, it is the duty of the driver to stop. If the roads are in such a condition that it is not safe to go at more than a foot pace, his duty is to proceed at a foot pace.

Cetinski v. Forman, [1972] 2 O.R. 484, 26 D.L.R. (3d) 49 (Ont. H.C.)

Trinidad Leaseholdings (Canada) Ltd. v. Gordon, [1953] O.W.N. 83 (Ont. Co. Ct.)

R. v. Lucki (1955), 17 W.W.R. 446 (Sask. Police Ct.)

R. v. Patterson, [1964] 1 O.R. 628 (Ont. Mag. Ct.)

R. v. Wehage (1962), 41 W.W.R. 326 (Sask. Dist. Ct.)

R. v. McIver, [1965] 2 O.R. 475, 45 C.R. 401, [1965] 4 C.C.C. 182 (Ont. C.A.); *aff'd.* [1966] S.C.R. 254 (S.C.C.)

Gauthier & Co. v. R., [1945] S.C.R. 143, [1945] 2 D.L.R. 48 (S.C.C.)

MacInnis v. Bolduc (1960), 45 M.P.R. 21, 24 D.L.R. (2d) 666 (N.S.C.A.)

-s.127 H.T.A.

Pass on Right — Not in Safety; Pass — Off Roadway

It is to be noted that **Regulation 817**, R.R.O. 1980, sets out both of the “short wordings” above in reference to subsection 129(2). It would seem however that s.129(1) proscribes the offence of pass on right — not in safety while s.129(2) proscribes only the offence of pass — off roadway. In any event these are separate offences and a charge including both in one count will be void for duplicity.

R. v. Worden, [1962] O.W.N. 61, 132 C.C.C. 197 (Ont. C.A.)

-ss.129(1) and (2) H.T.A.

Paved Shoulder Deemed Not Part of Roadway

See notation re: s.127 (*supra*)

-s.130(3) H.T.A.

Follow Too Closely

The B.C.S.C. held that because the wording used for the charge was “follow another too closely” it failed to enumerate the essential elements of reasonableness and prudence and therefore referred to an offence not known to law [**Re Oskey**]. It is submitted that this is not the case in Ontario and the wording “follow too closely” is acceptable.

The leading Ontario case is **R. v. Ousley** which held that the mere fact of a rear end collision is insufficient to make out a *prima facie* case that the accused was following too closely contrary to s.105(1) [now s.136(1)] of the **Highway Traffic Act**. This holding is expanded upon in **R. v. Walsh**: there can be no conviction on said charge [Sask. “equivalent” to s.136(1)] in the absence of any, or any reliable, evidence as to the distance between the two cars. The fact that (the) accused was not keeping a proper lookout (civil responsibility) is not a ground for his conviction on said charge.

It is further submitted that the criteria of “reasonable and prudent having due regard . . .”

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reflects a standard of conduct not dissimilar to that of what the ordinary prudent men (sic) would do in the circumstances: (**R. v. Beauchamp**) — see Careless Driving s.111.

Re Oskey (1959), 31 C.R. 229, 29 W.W.R. 415 (B.C.S.C.)

R. v. Ousley, [1973] 1 O.R. 729, 10 C.C.C. (2d) 148 (Ont.C.A.)

R. v. Walsh (1960), 33 W.W.R. 91 (Sask. Mag. Ct.)

-s.136(1) H.T.A.

Fail to Stop — For Emergency Vehicle

To impose upon the driver of a vehicle the duty of giving the right of way to an emergency vehicle he must know or, in the exercise of ordinary prudence, should know that an emergency vehicle is approaching, and he must be given a reasonable opportunity to comply with the requirements of the law.

County Court Judge O'Hearn found a contravention of the Nova Scotia provision regarding failure to yield to an emergency vehicle where the defendant was culpably ignorant in his positive duty to so conduct himself as to be able to hear an audible siren, that is, a siren that can be heard without difficulty by motorists who have to yield to it.

R. v. Delory (1972), 8 C.C.C. (2d) 367 (N.S. Co.Ct.)

Fingerote v. Winnipeg (City) and Reid (1963), 45 W.W.R. 634 (Man. C.A.)

-s.137(1) H.T.A.

Drive While Crowded

A Sask. District court defined overcrowding as “more persons than will allow the driver to operate his vehicle freely, without interference and safety; that is, if his movements, or any of them, as they affect the gear shift lever, the brakes, the clutch, the accelerator, the steering wheel, are impeded or interfered with, or if his vision is cut down so that he cannot safely drive or operate his vehicle, then it is overcrowded. Numbers as such are not an absolute guide for a conclusion as to overcrowding.”

It is clear that, in fact, the offence may be committed with no passengers at all if articles of property were so placed as to interfere; a single passenger occupying a position of sufficient proximity to the driver could fulfill the elements of the offence.

The reference to proper management, as distinguished from control of the motor vehicle, would encompass, it is submitted, the interference with operation of such items as the signal light lever, headlight switches etc.

R. v. Patrick (1955), 16 W.W.R. 23 (Sask. Dist. Ct.)

-s.140 H.T.A.

Disobey Railway Crossing Signal — Proceed Unsafely

A Nova Scotia County Court held — failure to stop must include failure to remain or continue stopped. When the warning is given the vehicle must stop but as the warning is a continuing warning so the stop must be a continuing stop till (sic) the apprehended danger is past.

R. v. Holmes (1953), 71 C.C.C. 358 (N.S. Co. Ct.)

-s.141 H.T.A.

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Parking Infractions:

Bylaws: In Saskatchewan where the bylaw requires that the installation of parking meters requires a resolution of Council, such resolution must be proved in evidence [**R. v. Babcock**].

Where a motorist parked his vehicle in a prohibited parking area designated as a snow removal area on a day when no snow was on the ground and the seasonal parking prohibition was due to expire in eight days the charge was dismissed on the basis of the maxim de minimus non curat lex (the law does not concern itself about trifles). A conviction of the defendant would only bring the administration of justice into ridicule and contempt having regard to all the circumstances (**R. v. Webster**).

Regarding owner's liability see Budget Car Rentals s.181 infra

R. v. Babcock (1959), 28 W.W.R. 93, 30 C.R. 294, 123 C.C.C. 288 (Sask. Dist. Ct.)

R. v. Webster (1981), 10 M.V.R. 310, 15 M.P.L.R. 60 (Ont. Dist. Ct.)

-s.147 H.T.A.

Race a Motor Vehicle

The Saskatchewan prohibition against racing is almost identical to s.148(1). In **R. v. Smith** it was held that the section created three offences, namely: driving a motor vehicle upon a public highway in a race; driving a motor vehicle upon a public highway on a bet; driving a motor vehicle upon a public highway on a wager.

S. 174(1) of the **Manitoba Highway Traffic Act** states, "no person shall race a motor vehicle with another motor vehicle upon a highway". This section was used in **R. v. Flannery** where the holding was similar to that in **R. v. Smith** (supra), "in order to support a conviction under this section it is not necessary to prove that the accused expressly agreed with another, or others, to embark upon a race; such may properly be inferred from his observed conduct." The **Flannery** judgment continues, "the repetition of conduct shows agreement. Speed or excessive speed is relative and only one element of the race. The other two elements are a rival and competitive movement." In **Flannery** a conviction was registered where two cars "raced" up and down the main street of a small town. Although the observed speed was around 50 k.p.h. (the speed limit) their repetition of the action three times was judged to infer a race.

R. v. Smith, [1971] 5 W.W.R. 674 (Sask. Dist. Ct.)

R. v. Flannery (1982), 15 M.V.R. 116, 15 Man. R. (2d) 162 (Man. Co. Ct.)

-s.148 H.T.A.

Disobey Sign:

Erection of Signs: Strict compliance with the regulations is not required if the sign substantially complies albeit with a slight deviation which does not negate a reasonable indication as to its authority. The deviation is only material if it becomes evident that a driver keeping a reasonably alert look out could not have seen the sign [**R. v. Priest**]. Evidence that a (stop) sign was erected is prima facie evidence of compliance with the regulations [**R. v. Lavelle**]; this also applies to evidence of a speed limit established by bylaw [**R. v. Clark**] and the designation by bylaw of a pedestrian crossover [**R. v. McLaren**].

The signs must be clear and open to only one interpretation having regard to the nature of the intersection at which they were placed [**R. v. Fillmore**]. In **R. v. Fillmore** the intersection was a rotary or traffic circle in combination with an entrance to a parking lot. It was held to be unclear as to what prohibition the no-turn sign was directed.

Any such sign must be erected by the proper authorities. If the defence proves that the sign

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was erected by Federal authorities on Federal property this section is not applicable [**R. v. Debon**].

- R. v. Priest, [1961] O.W.N. 166, 35 C.R. 32 (C.A.)
- R. v. Lavelle (1958), 29 C.R. 156, 122 C.C.C. 111 (Ont.H.C.)
- R. v. Clark (1974), 3 O.R. (2d) 716, 18 C.C.C. (2d) 52 (Ont.C.A.)
- R. v. McLaren (1981), 10 M.V.R. 42 (Ont. C.A.)
- R. v. Fillmore (1977), 76 N.S.R. (2d) 631, 40 A.P.R. 631 (N.S.Co.Ct.)
- R. v. DeBon, [1978] 2 W.W.R. 381 (B.C. Co.Ct.)
- s.158(2) H.T.A.

Duty to Report Accident:

Location: The language of s.110(1) [now s.173(1)] interpreted literally is very comprehensive and quite capable of including accidents involving motor vehicles either on or off a highway [**R. v. Berg**; relied on in **Bell v. R.**].

Duty: Unless it is first established that the person whose conduct is under review was actually in charge or control of the vehicle involved in the accident no duty of disclosure is cast upon him [**R. v. Patrick**]. This holding is qualified by 173(2) which states an occupant of the vehicle shall make the report if the person in charge is physically incapable. In **R. v. Patrick** a criminal charge of obstruction was quashed as there was no proof Patrick was in charge of the hit and run car. It is also to be noted that s.181, regarding owner's liability, does not apply to s.173.

Forthwith: Forthwith, in said section [**Sask. Vehicles Act** s.153(1)], means within a reasonable time having regard to all the circumstances of the case. The reasonable time will vary with the seriousness of the accident [**R. v. Pearson**]. In that case a delay of six hours was, with "considerable hesitation", held to in compliance with the section. **R. v. Pearson** was approved in **Bell v. R.** where it was held that the determination of the forthwith issue (as promptly as is reasonably possible or practicable under all the circumstances) is a question of fact. In that case a seven hour delay was acceptable in the circumstances of an industrial vehicular accident.

Delegation: In New Brunswick it has been held that the obligation to report can be delegated [**R. v. Miller**]. It is submitted that this may not be the case in Ontario where s.173(2) appears to require physical incapacitation of the person in charge before the statute makes a delegation of responsibility to another occupant.

- R. v. Berg, [1956] O.W.N. 653 (Ont. Co. Ct.)
- Bell v. R. (1968), 64 W.W.R. 668, 4 C.R.N.S. 351, [1969] 2 C.C.C. 9 (Sask. Q.B.)
- R. v. Patrick, [1960] O.W.N. 206, 32 C.R. 388 (Ont. C.A.)
- R. v. Pearson (1960), 32 W.W.R. 457 (Sask. Mag. Ct.)
- R. v. Miller (1981), 36 N.B.R. (2d) 181, 94 A.P.R. 181 (N.B.Q.B.)
- s.173(1) H.T.A.

Fail to Remain

S.143a(1)a [now s.174(1)(a)] creates one offence only, which is constituted by a failure to do both acts (remain at or immediately return to) and accordingly an Information charging such offence in the words of the section is not void for duplicity [**R. v. Budden**].

Accident: Accident means any contact between a vehicle and any object and even without damage the obligation to remain immediately arises. Consequently, a lack of knowledge that damage (if any) had occurred is no defence [**R. v. Hill**].

Lack of knowledge of the accident, that is, contact is a proper defence. Without such

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knowledge there is no actus reus. Even though this is not a mens rea offence such knowledge, which in many cases may be deemed to have existed, is an essential element [**R. v. Racimore**].

In **R. v. Kirby** [1983, B.C. Co. Ct.] the defendant's car rolled into a motorcycle after Kirby parked the car. Because he was not driving at the time of the collision and because the B.C. charge specified "driver" he was acquitted. S. 174 refers to a "person in charge" of a vehicle (Note — not a motor vehicle but any vehicle) and, as a result, this case is not applicable.

In **R. v. King** [1970, Ont. C.A.] the defendant struck a pedestrian and then turned the car around and returned to the scene to assist the injured person. King gave the police his correct name and address but stated he had observed the person lying in the ditch as he passed by. He was convicted of failing to stop at scene of accident s.221(2) [now s.233(2)] of the Criminal Code.

R. v. Budden, [1964] 2 C.C.C. 290 (Ont. Mag. Ct.)

R. v. Hill, [1972] 2 O.R. 402, 17 C.R.N.S. 124, 6 C.C.C. (2d) 285 (Ont. H.C.) Affirmed 1 N.R. 136, 43 D.L.R. (3d) 532 (S.C.C.)

R. v. Racimore (1975), 25 C.C.C. (2d) 143 (Ont. H.C.)

R. v. Kirby (1983), 20 M.V.R. 158 (B.C. Co. Ct.)

R. v. King, [1970] 2 O.R. 5 (Ont. C.A.)

-s.174(1) H.T.A.

Vehicle Owner May be Convicted

S.181 replaces the former s.147(1) which stated that the owner "shall incur the penalties . . .". The wording of s.181(1) now states that the owner "may be charged with and convicted of an offence . . .". This change in wording renders the obiter dicta that "the information quoted above [a charge of s.140(1)(a) (now s.174(1)(a)) pursuant to s.147(1) (now s.181(1))] discloses no offence of which the accused, as owner, might be convicted" irrelevant [obiter dicta in **R. v. Gauthier**, 1977, Ont. H.C.].

The leading case regarding the conviction of a vehicle owner with a parking violation is **R. v. Budget Car Rentals** [1987, Ont. C.A.]. Budget was based on a by-law violation; the by-law was passed pursuant to s.460 of the **Municipal Act**. The owner was convicted upon the provision of s.460 paragraph 8(b) of the **Municipal Act** which holds the owner "liable to any penalty provided under a by-law . . .". Reference was made to s.147(1) (before it was amended as the offence date was prior to amendment). Although any reference to s.147(1) was obiter the case is useful in this context as it clearly establishes the concept of owner's liability.

It was also noted in the Budget case that a person must be specifically charged as owner so that he appreciates the nature of the offence and the defences open to him [**R. v. Lockie**, 1950, Ont. H.C., **R. v. Greenfield**, 1954, Ont. H.C. and **R. v. Webb** 1961, B.C.S.C. referred to in support].

Autrefois: The offences of owner and driver under the **Motor Vehicle Act** (B.C.) are separate and distinct and are not proceedings "in respect of the same cause" within the meaning of those words as they appear in the **Summary Convictions Act**. It follows that an individual may be charged with an offence under the **Motor Vehicle Act** either as driver or owner of a motor vehicle, or both [**Regina v. Webb**, supra].

In **Regina v. Vaugeois** [1959, B.C.C.A.] it was held [without written reasons] that a conviction or acquittal under s.131 [B.C. M.V.A. fail to remain] is no bar to a subsequent charge under sections 70 [B.C. M.V.A. owner's liability] and 131. But see also **R. v. Curley** [1953, Ont. H.C.] where it was held that the charge having been laid against the owner as operator of the

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car and he having been absolved from blame, he cannot be held to be liable to conviction under s.47 (now s.181(1)). It is to be noted, however, that the wording of s.181 has been altered to refer not to "any violation of this Act" but to "an offence under this Act." It is submitted that, assuming the facts constituting an offence under the **H.T.A.** can be proved, **R. v. Curley** is no longer a barrier to a conviction of the owner regardless of whether he has been acquitted as a driver (presumably because of lack of identification).

Burden of Proof: The burden of proving the exception that the vehicle was in the possession of some person other than the owner without the owner's consent rests upon the owner or the vehicle [**R. v. Arbon**, 1981, Ont. Div. Ct.].

Charter Implications: S.270 of the **Motor Vehicle Act** of New Brunswick (owner's liability section) was held not to be a violation of s.11(d) of the **Charter**. It was pointed out that the words in s.11(d) are not "presumed innocent until proven guilty beyond a reasonable doubt", the words are "proven guilty according to law" [**R. v. Ferlatte**, 1983, N.B.Q.B.].

To charge the owner of a motor vehicle re: "fail to stop for school bus", 29 days after the fact, was held not to violate s.11(a) of the **Charter**. Section 11(a) does not apply to pre-charge delay [**R. v. Heit**, 1983, Sask. C.A.].

Note, however, that s.181(2) lists, as an exception to s.181, s.151. The substance of the **Heit** charge is no offence in Ontario for an owner who is not the driver.

R. v. Watch [1983, B.C.S.C.] held that s.76 of the **Motor Vehicle Act** (B.C.) (owner's liability section) is a strict liability section and does not contravene s.7 of the **Charter**. It was also stated in obiter dicta that s.11(d) of the **Charter** was not violated. Mr. Murray D. Segal's annotation to this case outlines three defences available to the registered owner:

"That he is not the owner, that he did not entrust the vehicle to the person in possession, or that, where he did entrust the vehicle to the person in possession, he did so with reasonable care, or due diligence."

Mr. Segal then points out that

"Both the defences of "non-entrustment" and "due diligence" will in practice require the owner to identify the driver of the vehicle who committed the offence if the driver is known to the owner."

In **R. v. Burt** [1985, Sask. Q.B.] Gerein J. disagreed with the conclusions in the **Watch** and **Ferlatte** cases. Mr. Burt was charged, as being the owner of a motor vehicle, with unnecessary noise. The driver of the vehicle was not identified. Mr. Justice Gerein noted that, as owner, Mr. Burt had not committed the actus reus of the offence yet he would be subjected to punishment for the acts of another not on the basis that he improperly permitted the use of his vehicle by another or that he refused to supply information regarding the user of his motor vehicle, rather, liability would accrue for the substantive offence or actual violation. This result, it was held, would be contrary to the principles of fundamental justice as enshrined in s.7 of the **Charter**.

R. v. Gauthier (1977), 36 C.C.C. (2d) 420 (Ont.H.C.)

R. v. Budget Car Rentals (Canada) Ltd., (1981), 31 O.R. (2d) 161, 9 M.V.R. 52, 20 C.R. (3d) 66, 57 C.C.C. (2d) 201, 121 D.L.R. (3d) 311 (Ont. C.A.)

R. v. Lockie, [1950] O.W.N. 589, [1950] 4 D.L.R. 443, 10 C.R. 477 (Ont. H.C.)

R. v. Greenfield, [1954] O.W.N. 292 (Ont.H.C.)

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R. v. Webb (1961), 36 C.R. 252, 36 W.W.R. 431, 131 C.C.C. 276 (B.C.S.C.)
 R. v. Vaugeois (1959), 29 W.W.R. 368 (B.C.C.A.)
 R. v. Curley, [1953] O.W.N. 603, [1953] 4 D.L.R. 135, 16 C.R. 419 (Ont. H.C.)
 R. v. Arbon (1981), 11 M.V.R. 227, 62 C.C.C. (2d) 11 (Ont. Div. Ct.)
 R. v. Ferlatte (1983), 23 M.V.R. 253, 49 N.B.R. (2d) 246, 129 A.P.R. 246 (N.B.Q.B.)
 R. v. Heit (1983), 28 M.V.R. 46, 11 C.C.C. (3d) 97, [1984] 3 W.W.R. 614, 9 C.R.R. 80, 7 D.L.R. (4th) 656, 31 Sask. R. 126 (Sask. C.A.)
 R. v. Watch (1983), 24 M.V.R. 224 (B.C.S.C.)
 R. v. Burt (1985), 21 C.C.C. (3d) 138, 47 C.R. (3d) 49, 35 M.V.R. 244, [1985] 5 W.W.R. 545, 40 Sask. R. 214 (Sask. Q.B.)
 -s.181 H.T.A.

Refuse to Surrender Suspended Driver's Licence

An out-of-province driver's licence may be seized by a Judge (for the purposes of this section a Justice of the Peace is a Judge, s.185(1))

R. v. Boisvenu (1975), 17 M.V.R. 86 (Ont.H.C.)
 R. v. Jack (1981), 17 M.V.R. 77 (Ont.Prov.Ct.)
 -s.185(3)

Driver Improvement Program-Suspension of Fine

The Ont. C.A. in **R. v. Sortino** held that the provisions, regarding attendance at a Ministry conducted driver improvement program and a resulting judicial discretion to lower the fine, of s.152a(2) [**H.T.A.**, R.S.O. 1970, c.202] were not conducive to an application of s.71 of the **P.O.A.** The result was the offender had to attend and successfully complete the course and then re-attend before the same Justice in order for the Justice to determine if the fine was to be reduced. This procedure greatly frustrated the **P.O.A.** provisions.

As a result of this case s.152a(2) was replaced by s.189(2) which turns upon the convicted party's agreement to attend, as opposed to the attendance itself.

The new legislation, it is submitted, corrects the deficiencies of the former s.152a(2) and, as a result, is compatible with the s.71 provisions in the **P.O.A.**

R. v. Sortino (1981), 60 C.C.C. (2d) 166 (Ont.C.A.)
 -s.189(2) H.T.A.

Power of Police Officer to Stop Vehicles

Nature of the Offence: Section 30a(1) provides for spot checks regarding drinking and driving. Section 189a(1), on the other hand, pertains to a general power to stop motor vehicles.

Section 189a(1) creates a strict liability offence [**R. v. Bunting**, 1983, B.C. Co. Ct.; **R. v. Dilorenzo**; **R. v. Bancroft**, 1984, Ont. C.A.]. This section is to be carefully distinguished, in this respect, from the penalty/procedure for escape by flight, s.189a(3), which requires proof of mens rea [see *Escape by Flight*, *infra*]. "The doing of the act, namely, the failing to come immediately to a safe stop in the circumstances specified in subs. 1, prima facie imports the offence, leaving it open to the accused to avoid liability by proving he took all reasonable care" [**R. v. Dilorenzo**; **R. v. Bancroft** at M.V.R. 272].

Section 189a did not constitute an intrusion into criminal law, as the gravamen of the section was to confer on police officers the power to require motor vehicles to stop and its officers the power to require motor vehicles to stop and its offence creation feature was subsid-

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iary and ancillary to the conferral of the power to stop. Furthermore, there was no conflict between s.189a and s.118(a) of the **Criminal Code**, [**R. v. Hisey**, 1985, Ont. C.A.].

R. v. Bunting (1983), 26 M.V.R. 23 (B.C. Co. Ct.)

R. v. Dilorenzo; R. v. Bancroft (1984), 45 O.R. (2d) 385, 11 C.C.C. (3d) 13, 26 M.V.R. 259, 2 O.A.C. 62 (Ont. C.A.)

R. v. Hisey (1985), 40 M.V.R. 152, 24 C.C.C. (3d) 20 (Ont. C.A.), leave to appeal to Supreme Court of Canada denied 86/04/22

-s.189a(1) H.T.A.

Elements of the Offence: Note that the police officer must be in the lawful execution of his duties and responsibilities. Note the inclusion of responsibilities. This would appear to expand the parameters of applicability as compared to assaulting a peace officer in s.246(1)(a) of the **Code**. See also **Day v. R.** [1985, Ont. Dist. Ct.].

In **R. v. Bancroft** [supra] a uniformed police officer in an unmarked police cruiser attempted to stop the defendant [during daylight] by moving the cruiser into the defendant's lane. The defendant attempted to flee; the officer shouted out his open window to stop; the defendant's passenger window was open. The Ontario Court of Appeal held that having regard to the objective evidence, i.e., the officer's blue O.P.P. shirt with identifying shoulder patches plainly visible, the police officer was readily identifiable as such. Quare whether a plainclothes officer who produces suitable identification such as a warrant card and/or wallet badge, or sounds a siren in an unmarked cruiser is readily identifiable as a police officer. It is submitted that the inclusion of the adverb "readily" indicates an objective test although if the officer was in plain clothes but known to the accused the defendant's subjective identification would be sufficient.

Day v. R. (1985), 36 M.V.R. 221 (Ont. Dist. Ct.)

Charter Implications: The effect and purpose of s.119 of the **Highway Traffic Act** of Alberta is similar to s.189a. It was held in **R. v. Parton** [1983, Alta. Q.B.] that s.119 did not contravene ss.7, 8 or 9 of the **Charter of Rights**. See also **R. v. Moretto** [1984, Man. Q.B.] where the Manitoba provisions [s.71(2)] were held not to violate the **Charter** [M.V.R. 300-302].

R. v. Parton (1983), 9 C.C.C. (3d) 295, 25 M.V.R. 177, 50 A.R. 233 (Alta. Q.B.)

R. v. Moretto (1984), 14 C.C.C. (3d) 427, 28 M.V.R. 290 (Man. Q.B.)

NOTE. See **Escape by Flight**, infra, regarding issues common to ss.189a(1) and 3.

-s.189a(1) H.T.A.

Escape by Flight

Nature of Section 189a(3): Unlike s.189a(1), s.189a(3) does not create a specific offence — it relates to penalty and specifies circumstances in which a three-year licence suspension must be ordered. But before the order may be made the Court must be "satisfied" that the person convicted of contravening s.189a(1) engaged in a particular type of aggravated conduct, that is, that he "wilfully continued to avoid police while a police officer gave pursuit". The word "wilfully" used in this context means with the intention of avoiding the police and, . . . must be construed so as to import mens rea [**R. v. Dilorenzo; R. v. Bancroft**, supra, M.V.R. 272: overruling in part **R. v. Worth**, 1983, Ont. Co. Ct.].

In that same case the Court of Appeal [at M.V.R. 276-7] outlined the procedures involved:

"In sum, the scheme established by s.189a appears to be this. Subsection (1) furnishes a police officer acting in the lawful execution of his duties with a general power to stop a driver, and requires the driver to come to a stop when so requested by a police

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officer readily identifiable as such. Subsection (3) is aimed at aggravated examples of conduct covered by s-s. (1) that arise in a police chase and, as a deterrent for those who would engage in the highly dangerous conduct involved in a police chase, prescribes a substantial licence suspension. A finding under s-s. (3) may be made only following a conviction under s-s. (2). To invoke s-s. (3) the prosecution must allege the circumstance set out in s-s. (3) in the Information. Where this allegation is made, the defendant is to be given the oral notice provided for in s-s. (4). Following conviction, if the court is satisfied on the standard of proof discussed earlier [proof of mens rea beyond a reasonable doubt] that the prosecution has proved that the defendant wilfully continued to avoid police while a police officer gave pursuit it is compelled to make an order suspending the driver's licence for three years. The suspension is not invalidated because of a failure to give the oral notice (s-s. (5)). But in the absence of an allegation of the circumstances set out in s-s. (3) in the Information, the sentencing stage of the proceedings provided for by s-s. (3) cannot properly be reached, and it follows, the sanction prescribed by that subsection cannot properly be imposed."

Note also that an allegation of the circumstances set out in s.189a(3) must be included in the Information of the s.189a(1) charge if the suspension is to be imposed. The Court of Appeal [at M.V.R. 277] made favourable reference to a charge wording as follows:

"did commit the offence of failing to stop his motor vehicle when signalled or requested to stop by a police officer who was readily identifiable as such, contrary to subsections 189a(1) and (2) of the **Highway Traffic Act**.

In a chase situation, the following should be added:

and it is further alleged pursuant to subsection 189a(3) of the said Act that John Doe did wilfully continue to avoid police while a police officer gave pursuit."

For an example of a defective Information see **Day v. R.** [1985, Ont. Dist. Ct.].

R. v. Dilozenzo; R. v. Bancroft (1984), 45 O.R. (2d) 385, 11 C.C.C. (3d) 13, 26 M.V.R. 259, 2 O.A.C. 62 (Ont. C.A.)

R. v. Worth (1983), 21 M.V.R. 89 (Ont. Co. Ct.)

Day v. R. (1985), 36 M.V.R. 221 (Ont. Dist. Ct.)

Discretion Re: 3 Year Suspension: The Court of Appeal in **R. v. Dilozenzo; R. v. Bancroft** [supra] after examining s.60(1) of the **Provincial Offences Act** [regarding minimum penalties and judicial flexibility in that regard] held that s.189a(3) does not prescribe a minimum penalty but a fixed penalty in which the minimum and maximum coincide. No discretion as to variance exists.

Res Judicata: In **Ueffing v. R.** [1980, N.S.C.A.] a conviction for failing to obey the signal of a police officer [similar to s.189a] was held not to violate the rule in **R. v. Kienapple** [1975, S.C.C.], against multiple convictions arising from the same act or matter or delict, when it was laid in conjunction with a dangerous driving charge. In that fact situation the provincial violation occurred prior to the dangerous driving and was a separate action. It is submitted that the driving required to escape by flight need not be dangerous nor indeed even careless it must merely be continued avoidance of a pursuing police officer. It is possible to imagine a fact situation where a s.189a(1) violation is aggravated into an s.189a(3) situation which might, in turn, be aggravated into a careless or dangerous driving charge.

This issue does not, however, necessarily turn on the sequence of offences. The judgment of Brooke J.A. in **R. v. Brisson; R. v. Kennedy** [1986, Ont. C.A.] was concurred with by the

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entire panel. Brisson was charged with s.189a and careless driving; Kennedy faced s.189a and dangerous driving. Mr. Justice Brooke stated:

“In my opinion, **Kienapple** is not applicable to either of these cases. Sections 189a(1) and (2) of the **Highway Traffic Act** make it an offence for a driver to fail to stop in response to the command of a police officer. Section 189a(3) does not create an offence but goes to the penalty for a driver who is guilty of the offence created by s.189a(1) and (2). If the court finds that a driver who is guilty of failing to stop in response to an order of a police officer, wilfully continues to avoid police while a police officer gives pursuit then the court must impose the penalty provided in s.189a(3). The principle in **Kienapple** does not deal with penalties. I think the duty to stop in response to an order of a police officer and to avoid police chases is quite different from the duty to drive with care which can, depending on the circumstances, give rise to a conviction of careless driving or perhaps dangerous driving under the **Criminal Code**. The purpose underlying s.189a is quite different from that underlying the legislation creating the offence of careless driving or the crime of dangerous driving. The first is to clothe the police with authority to stop a driver and make it an offence if he fails to obey with special penalties if he continues to avoid police pursuit. The legislative purpose with respect to careless or dangerous driving is to protect the public from the danger on the highway of driving in the manner defined and punish those who drive in that way. If a driver is intent on attempting to avoid police after failing to stop in response to their order it does not matter whether he drives with care. To drive carefully around the corner and hide in a driveway would be enough to bring down the additional penalty under s.189a(3).”

Mr. Justice Holden, agreeing in the result, added:

“In the present cases, once the Crown had proved that the accused had failed to stop when signalled to do so and had wilfully continued to avoid police while a police officer gave pursuit, it was entitled to a conviction under s.189a(2) and to the imposition of the additional penalty under s.189a(3). For a conviction under s.189a(3), it was unnecessary for the Crown to prove that the accused had driven carelessly or dangerously. However, in order for the Crown to obtain a conviction for careless driving or dangerous driving, it had to prove that the accused had done something beyond what was required to establish the offence under s.189a. . . . The rule in **Kienapple v. The Queen** has accordingly no relevance for these cases.”

It is also submitted that the **Brisson/Kennedy** principle can be justified by another path of logic. It would seem that because s.189a(3) does not use wording such as “. . . is guilty of an offence and upon conviction is liable . . .” and because it provides a civil disability and not a penalty [see Annotations to Suspension on Conviction for Certain Offences, s.26(1) **H.T.A.**, supra] it is a procedural requirement arising out of a conviction [with certain aggravating factors present] of s.189a(1). The penalty subsection [s.189a(2)] makes reference only to subsection (1). Viewed in this way the principle in **Kienapple** [supra] could in no way be violated by an employment of s.189a(3) used in conjunction with a charge of dangerous or careless driving or criminal negligence in the operation of a motor vehicle. Although the driving charge and the circumstances of aggravation may arise from the same actions, only the driving charge could result in a conviction; consequently only one charge would be founded on the act or matter or

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delict.

Ueffing v. R. (1980), 7 M.V.R. 155 (N.S.C.A.)

R. v. Kienapple, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 (S.C.C.)

R. v. Brisson; R. v. Kennedy (1986), 37 M.V.R. 313 (Ont. C.A.)

-s.189a(3) H.T.A.

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Liquor — Evidence of Liquor

Section 129 of the **Liquor Control Act** (R.S.O. 1950) provided that: “The justice trying a case shall, in the absence of proof to the contrary, be at liberty to infer that the liquor in question is intoxicating from the fact that a witness describes it as intoxicating or by a name which is commonly applied to an intoxicating liquor.”

In **R. v. Clarke** neither the confiscated liquor nor any statement of analysis were introduced into evidence at trial. There was evidence that many bottles were labelled “Carling’s Black Label Beer”; one was labelled “Gooderham & Worts”. The accused referred to a small sealer containing rye whiskey; a police officer described all the liquor found as “intoxicating”; and the word “liquor” was used repeatedly without any cross-examination on its use.

Held, there was sufficient evidence for the Justice to infer that there was intoxicating liquor as provided by s.129.

It might be argued that judicial recognition of such evidence, drawn as inferences of fact from the kind and quantity of (alleged) liquor found in the possession of the accused person, is still part of the common law notwithstanding the deletion of the evidentiary sections of the 1970 **L.C.A.** from the current legislation.

R. v. Clarke (1958), 120 C.C.C. 378 (Ont.Co.Ct.)

-s.1(f) L.L.A.

Licences and Permits for Sale of Liquor — Illegal Sale

A corporation may be convicted under this section if it is proved that an officer or servant of the corporation who managed and controlled the premises had the necessary mens rea

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[presumably lack of due diligence since **Sault Ste. Marie**] (**R. v. Park Hotel Ltd.**). In both **R. v. Warren** and **R. v. Hawthorne** cab drivers, at the instigation of under-cover police officers, obtained liquor from bootleggers and “sold” it to the police officers.

Held: Acquitted; the cab drivers were merely agents of the police officers, the real purchasers. These were Sask. and B.C. cases, however, and the results might have been different had the provisions of s.54(1) of **Ont. Reg. 581** (conditions of agency re: purchase and delivery of liquor for fee) been applied.

A fortiori, special investigators employed specifically in the enforcement of the provincial liquor laws, have as part of their duty the detection and prosecution of infringements under the act; they are not persons employed by the police to detect crime or so called “police spies”. Their evidence, therefore, is not to be discredited by that account. The officers here were not “agent provocateurs” or accomplices. (**R. v. Park Hotel Ltd.**)

Note carefully the definition of “sell” in s.1(m). Does this definition render the owner, as supplier, vicariously liable for sales effected by employees?

R. v. Park Hotel Ltd., [1966] 2 O.R. 316 (Ont. Dist. Ct.)

R. v. Warren (1972), 7 C.C.C. (2d) 536 (Sask. Dist. Ct.)

R. v. Hawthorne (1971), 3 C.C.C. (2d) 505 (B.C. Co. Ct.)

-s.4 L.L.A.

Interdiction Orders

In **R. v. Davis** (1922) a B.C. Court commented that “the whole scheme is to enable a family to prevent a man who is abusing the use of liquor from doing so to the detriment of his family . . . It is for the protection of the family and for families solely, and cannot be used by the police or any other person for any other purpose”. Although this is one of the purposes of the current Ontario legislation, it would seem that protection of the individual’s health and his estate, whether or not he has any family whatsoever, are also included in the mischief sought to be prevented.

Note also that the offence of supplying liquor to an interdicted person proscribed by s.34(6) quite clearly requires mens rea by its inclusion of “knowingly”.

R. v. Davis (1922), 31 B.C.R. 453

-s.34 L.L.A.

Sale to Persons Under Influence

“A hotel whose owner and servants serve a patron beer until and after he becomes intoxicated and then eject him from the premises knowing he is in an intoxicated condition and unable to take care of himself is liable to the patron when he is negligently run down by a car as he is walking home.

In selling the plaintiff beer up to and past the point of visible or apparent intoxication the defendants contravene s.53(3) of the **Liquor Licence Act**, [now s.43].

This unlawful act is also a breach of a common law duty to the plaintiff not to serve him liquor when he was visibly intoxicated. The right of the hotel under s.53(4)(b) and (c) of the **Liquor Licence Act** [now s.47(1)] to eject an intoxicated person who refuses to leave voluntarily is qualified by a duty of care not to eject him if it is reasonably foreseeable that as a result of

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such an ejection he will be placed in a position of personal danger.” (**Menow v. Honsberger et al.**)

See also Annotations re: ss.47(1) and 53.

Menow v. Honsberger, [1970] 1 O.R. 54 (Ont.H.C.); affirmed [1971] 1 O.R. 129 (Ont.C.A.)

-s.43 L.L.A.

Persons Under 19 Have, Consume, Purchase or Otherwise Obtain Liquor

In order to support a conviction of obtaining liquor there must be more than evidence that the defendant consumed it; he must have put forth some effort to obtain it and not merely have had it given to him. See also Annotation re: s.53 (Arrest Without Warrant).

R. v. Stephens, [1960] O.W.N. 63 (Ont.Co.Ct.)

-s.44(3) L.L.A.

Prohibition of Sale of Liquor to a Person Under, or Apparently Under, 19 Years of Age

Section 44(1) proscribes a mens rea offence of knowingly selling or supplying liquor to a person (actually) under 19.

Section 44(2) proscribes a strict liability offence of selling or supplying liquor to a person who is apparently under 19. (**Kazia v. The Queen, R. v. Boardman**).

Proof of Age: In **R. v. Peacock** an Ont.Co.Ct. held that a voluntary statement (of an accused, to a police officer, giving his date of birth) constituted an admission against the interest of the accused, and, therefore, being an exception to the hearsay rule, was admissible in evidence as prima facie proof of the age of the accused.

Proof of Apparent Age: s.44(2) prohibits the sale or supply of liquor to a person apparently under 19 years of age, regardless of whether the person is actually 19 or older or younger than 19. Proof of the actus reus includes proof that the purchaser was, at the time of the sale “apparently” under age. This entails proof of more than simply the sale and the actual age of the customer. There must also be proof of the apparent age of the customer (**R. v. Boardman**). In **R. v. Boardman** it was held that although “there was H’s evidence that he was 17 years old, . . . that fact plus P. C. Bristow’s bare opinion (he witnessed a youth, apparently under the age of 19 years, enter the store) really amounted to no evidence of H’s appearance.” It would appear that a Crown witness must, as in any impaired driving or public intoxication charge, give evidence of his observations such as height, weight, complexion, lack of facial hair, demeanor etc., which leads to his opinion of the customer’s apparent age.

Section 44(2) directs that “the Justice shall determine from the appearance of such person and all other relevant circumstances whether he is (not was at the time of offence) apparently under the age of 19 years.” It was held, in **R. v. Boardman**, that this provision supplies an additional safeguard for the defendant and is not to be construed as beneficial to the prosecution. If the purchaser does not, at the time of trial, appear to be under 19, the defendant cannot be convicted. But the personal impression of the Justice cannot be used as a substitute for, or in addition to, independent evidence of the appearance of the patron.

The meaning of the word “apparently” as it is used in this subsection (now s.44(2)) is that (the patron) must be plainly, evidently or obviously under the age of 21 (now 19) years. (**R. v. Faiazza**).

Note that one means of erecting a “due diligence” defence to s.44(2) and a “lack of mens rea” defence to s.44(1) is reliance on an age of majority card, or other such documentation as is

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prescribed by the regulations, where there is no apparent reason to doubt (a) its authenticity or (b) that it was issued to the person producing it. (s.44(8) as amended 1984, c.1, s.8.)

In **R. v. Tyler** some of the liquor sold to an adult was subsequently consumed by a “minor” who accompanied the adult.

Held: these facts do not constitute a sale to a “minor” but to the person who had ordered and paid for it.

Note, also, the additional penalty provisions of s.55(2), (3) and (4) re: s.44(2) (licence suspension of not less than 7 days and minimum fines of \$500.00 or \$100.00) do not apply to s.44(1). This provision would seem to make it very beneficial for an offender to plead guilty to the mens rea offence in s.44(1) to avoid the increased penalties in the strict liability offence in s.44(2).

Kazia v. The Queen, [1978] 2 W.C.B. 452 (Ont. Dist. Ct.)

R. v. Boardman (1979), 47 C.C.C. (2d) 334 (Ont. Co. Ct.)

R. v. Peacock, [1968] 1 O.R. 698 (Ont. Co. Ct.)

R. v. Faiazza (1953), 15 C.R. 372 (Ont. Co. Ct.)

R. v. Tyler, [1950] O.W.N. 584, 97 C.C.C. 383 (Ont. Co. Ct.)

-s.44(1) and (2) L.L.A.

Definition of Public Place

“Public place” is a fluctuating term, and the meaning varies with the context, but as a general thing (sic) a public place is one where the public go, no matter whether they have a right to go or not (**R. v. Leitch**). In **R. v. Wise**, B.C.Co.Ct. Judge Perry considered not binding the obiter dicta of Mr. Justice Spence in **R. v. Hutt** (S.C.C.) regarding an automobile as being a private and not public place. Judge Perry stated that “even though the respondent’s automobile was his private property, it lost its character of a private place because of the manner in which he made use of it on the day in question. He drove his private car to the public parking lot, and located it in that public place. When he did the indecent act inside his car he was not screened from public view as though the windows of the car were curtained. He invited the little girl to approach his open car, so that she was within range to observe his indecent act and exposure. The car was thereby made accessible to her, by the express or implied invitation of the respondent.”

It is to be noted that s.45(1)(a) and (b) each use the word “means” as a preface to the definitions provided. The use of “means” as opposed to “includes” has the effect of restricting the definition to the specific descriptions provided. The cases above each proceed from a definition using “includes” as opposed to “means”; their logic, however, may be of some use in interpreting s.45(1).

A privately-owned motor vehicle, although being driven along a public highway is not a public place, . . . and hence a person who is in an intoxicated condition as a passenger in the vehicle cannot be convicted, . . . of being intoxicated in a public place (**McKibbon v. Caldwell**). It would appear however that taxi cabs and other modes of public transportation qualify as public places by virtue of the s.45(1) definition.

R. v. Leitch (1916), 26 C.C.C. 149 (Ont. H.C.)

R. v. Wise (1982), 67 C.C.C. (2d) 231 (B.C. Co. Ct.)

McKibbon v. Caldwell (1949), 97 C.C.C. 128 (Ont. Co. Ct.)

-s.45(1)(a) L.L.A.

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Definition of Residence

In **R. v. Doughty** an Ont. Magistrate's court held that a vessel to be a private dwelling must be exclusively in the control of the owner, lessee or tenant and/or his invitees — it must be capable of being used for human habitation, i.e., a place capable of affording protection from the elements, and privacy for the occupants — where they may eat, drink and sleep. It must also be or have been so used, but it need not at all times be immediately capable of providing all of these facilities nor need it be the occupants' only dwelling house.

Bearing in mind these factors then, unless a vessel has never been used as a private dwelling or is patently incapable of being so used it may be the private dwelling of its owner, lessee or tenant if it is under his exclusive control.

It is also to be noted that by "including all premises used in conjunction therewith (the place actually occupied and used as a dwelling) that is not a public place" s.45(1)(b) has embraced within the definition of residence most common areas and hallways in apartment buildings (except the front lobby perhaps); this is to be viewed in contrast with public intoxication which includes as a "public place" any part of a residence that is used in common by persons occupying more than one dwelling therein. It would seem that one may drink in these areas only so long as an intoxicated condition is not reached.

If a building is to be classified as a residence "there must be an actual occupation and user in the sense that the only use to which the dwelling is put is that of a private residence. It must not be used for purposes of business, or as a storeroom, or warehouse, or for any other colourable or questionable purpose" (**R. v. Mark Park**). This case would also seem to hold that a person may have more than one residence if, as a question of fact, it is found he resides in more than one residence.

A dwelling in which the occupant keeps his business books and papers will, if it is not held out to the public as his office or place of business nor in fact used as such, be considered a residence (**R. v. Hannah**).

R. v. Doughty (1968), 5 C.R.N.S. 98 (Ont.Mag.Ct.)

R. v. Mark Park (1920), 34 C.C.C. 203 (Ont.S.C.)

R. v. Hannah (1923), 40 C.C.C. 7 (Ont.Co.Ct.)

-s.45(1)(b) L.L.A.

Unlawful Consumption of Liquor

See annotation re: definition of residence s.45(1)(b) above.

-s.45(2) L.L.A.

Unlawful Possession of Liquor

The exception in s.45(3) would permit the possession of liquor in other than a licenced premises or residence providing that "the liquor is in a closed container and the container is not displayed to public view." It is submitted that "container" refers to the bottle, can, keg or box of wine, beer or liquor and does not refer to the case or other packaging within which these items are sold. Note also that this section refers to "closed" containers as opposed to "sealed" containers (see annotation re: s.48(1)). It would appear therefore that a part bottle of liquor, if recapped and in a bag or other container, does not fall within this section; neither does a part case of beer, providing that all bottles in the case are either capped, recapped or empty and the case is folded closed.

-s.45(3) L.L.A.

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Intoxication in a Public Place

This section pertains to intoxication in a public place and in any part of a residence that is used in common by persons occupying more than one dwelling therein i.e., all hallways in apartment buildings (see annotation re: s.45(1)(b)).

Re: "public place" see annotation s.45(1), especially **McKibbon v. Caldwell** which held that the intoxication of a passenger in a privately-owned motor vehicle was not intoxication in a public place.

-s.45(4) L.L.A.

Power to Eject from Licenced Premises

Section 47(1) creates a duty as well as a power to remove certain persons from a licenced premises. This duty clearly falls on the holder of the licence or permit. If the holder of the licence is not present at the time of the breach of duty the responsibilities regarding the management and operation of the premises must be delegated to another. This is particularly the case where the licence holder is a corporation which can, of course, only act through individuals. The corporation or absent licence holder may be vicariously liable regarding a breach of duty by its employees (**R. v. Royal Canadian Legion**). If the offence is one of strict liability the vicarious liability is automatic; if the offence requires mens rea then only a "directing mind" (having autonomous control of the area of operation in question e.g., pub manager) possessing the mens rea can cause guilt to be imputed to the corporation (**R. v. Dovco Holdings Ltd.**). These principles were elaborated upon by the Ont.C.A. in **R. v. St. Lawrence Corp. Ltd.** Note that both these cases predate **R. v. Sault Ste. Marie**; their use of the term strict liability would appear to include all offences not requiring mens rea. As a result offences of absolute as well as strict liability automatically generate vicarious liability, assuming that the employee was acting within the course of his duties at the time of the offence.

Section 47(1) indicates that the licence or permit holder "shall ensure" that his duty is fulfilled. Regarding the meaning of "shall ensure" it would seem that, at least as it is found in the **Industrial Safety Act** (Ont.), vol. 2, c. 43, this wording indicates "an imperative phrase, and in itself imposes strict liability on the employer" (**R. v. Slater Industries Ltd.**). This pronouncement was then qualified to permit a due diligence defence of taking "such precautions as are reasonable . . .". The Ontario High Court refined this principle in **R. v. Fiber & Wire Industries Ltd.**, where it held that a statutory direction to ensure imposes "a strict duty or strict liability on the person responsible for ensuring the carrying out of the provisions of the statute and its regulations." Both these cases predate **Sault Ste. Marie** as well; the usage of "strict liability" in each is qualified by a "reasonableness" criterion, however, and as a result the current meaning of "strict liability" would seem appropriate.

The third element involved in s.47(1) is the licence holder's belief (or that of his designate). It is to be noted that the wording used is "shall ensure that any person whom he has reasonable grounds to believe, . . ."; this is not followed by "and does believe" or words to such effect. It is submitted, therefore, that it is not the licence holder's belief that is in issue but his grounds for belief. These grounds for belief should be objectively evaluated on the basis of what a reasonable person, acting in the capacity of the licence holder, would have believed.

The current L.L.A. has deleted the charge of "suffering or permitting drunkenness to take place on a licenced premises." This mischief has not gone unnoticed, however, and is dealt with by s.43 (prohibiting service of liquor to an intoxicated patron) and s.47(1)(c) (duty and power to eject persons contravening the law). In regard to these sections, and perhaps s.53 (civil liabil-

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ity) as well, the Crown, it is submitted, must meet the same standard of proof required in the old “suffering or permitting” sections, that is, “it must be shown that (1) the licensee actually knew or should have known that the patron was drunk, or in the alternative that (2) he was wilfully blind, or in the alternative that (3) he was careless” (**R. v. Action Tavern Ltd.**).

The power and duty to eject certain persons (including intoxicated persons as they are in violation of s.45(4) being persons intoxicated in a public place, s.45(1)(a), and therefore shall be ejected by virtue of s.45(1)(c)) is qualified by a common law duty of care not to expose such persons to any reasonably foreseeable danger upon eviction. This is particularly so if the licence holder has contributed to the level of intoxication by serving such persons alcohol. See also ss.43 and 53.

- R. v. Royal Canadian Legion, [1971] 3 O.R. 522 (Ont.C.A.)
- R. v. Dovco Holdings Ltd. (1977), 34 C.C.C. (2d) 317 (Ont.Div.Ct.)
- R. v. St. Lawrence Corp. Ltd., [1969] 3 C.C.C. 263 (Ont.C.A.)
- R. v. Slater Industries Ltd., [1971] 1 O.R. 760 (Ont.Co.Ct.)
- R. v. Fiber & Wire Industries Ltd. (1973), 12 C.C.C. (2d) 71 (Ont.H.C.)
- R. v. Action Tavern Ltd. (1975), 26 C.C.C. (2d) 127 (Ont.Prov.Ct.)
- s.47(1) L.L.A.

Conveying Liquor in Vehicle

Sections 48(1)(a) and (b) outline the only exceptions to the prohibition regarding conveyance of liquor in a motor vehicle or motorized snow vehicle. The exception in s.48(1)(a) allows such conveyance providing that the liquor is contained in its (original) bottle or package which must be unopened (that is, capped or closed) with the (manufacturer’s) seal unbroken. (See annotation by Joseph J. Arvay in reference to **Vallee v. R.**, Ont.H.C., 14 May 1980, in (1980), 15 C.R. (3d) 386). Thus it is permissible to transport an “open” case of beer providing that all bottles are either capped or empty. (See annotation re: s.45(3) for contrast with unlawful possession of liquor).

The exception in s.48(1)(b) allows one to transport liquor which may be unsealed (and presumably opened) as long as the liquor is “packed with personal effects in baggage that is fastened closed” or as long as the liquor is “not otherwise readily available to any person in the vehicle.” An open, unsealed bottle of liquor stored in the rear area of a station wagon, for example, would not be an offence if the driver, to whom it would not be readily accessible, was the sole occupant, but would be an offence if a passenger situated behind the driver did have ready access to the liquor. The mischief to which this section is directed is clearly unlawful consumption of liquor in a motor vehicle (s.45(2)). By strictly regulating the mode of conveyance this section seeks to remove the temptation to consume liquor in a motor vehicle. The need for this supporting legislation relates to the increased danger of unlawful consumption in a vehicle as opposed to unlawful consumption as a pedestrian.

- Vallee v. R., 15 May, 1980 (Ont.H.C.), as noted in “Carrying an Open Case of Beer”, 15 C.R. (3d) 387
- s.48(1) L.L.A.

Search of Vehicles

The authority to conduct a search under this section is based upon the police officer’s reasonable grounds for belief that liquor is unlawfully in the vehicle at the time of the search.

- R. v. Patrick Ford (1983), 11 W.C.B. 450 (Ont.Co.Ct.)
- s.48(2) L.L.A.

LIQUOR LICENCE ACT

Civil Liability

This section reflects certain aspects of the common law duty of care of a seller of liquor to his patrons to ensure that they do not, as a result of the liquor sales, find themselves intoxicated to such a degree that they are in danger of causing injury to themselves or others or of causing property damage. Note that the liability attaches only to the person who, or whose agent or servant, sells the liquor. This person need not be a licence or permit holder but may instead be an illegal seller of liquor. Note also that the liquor need not be sold directly to the intoxicated party as long as it is purchased for that party.

This section is a civil elaboration of s.43. It should be read with that section as well as in conjunction with the right and duty to eject certain persons under s.47(1). (See annotations re: ss.43 and 47(1) especially **Menow v. Honsberger**, s.43 *supra*).

It would appear from earlier cases pertaining to the civil liability of hotel-keepers that the onus is on the plaintiff to bring himself strictly within the section, and, particularly where the injury arose from the use of a motor vehicle, to show that the defendant hotel-keeper knew that the person served with the intoxicant and for whose actions the hotel-keeper is sought to be made vicariously liable was using that mode of locomotion.

Cooper v. Temos, [1955] O.W.N. 900, [1955] 5 D.L.R. 548 (H.C.J.), *revd in part on other points* (1956) 3 D.L.R. (2d) 172 (C.A.)

-s.53 L.L.A.

Arrest Without Warrant — Fail to Identify

A predecessor of this section (s.111, L.C.A., R.S.O. 1960, c.217) provided for arrest without warrant of a person “found committing” an offence against the act. Failure to identify was not an issue at the time. Regarding a charge of having consumed or consuming liquor as a minor the Court of Appeal stated that “where, as here, the only evidence is to the effect that the appellant had the smell of liquor on his breath with an entire absence of anything to indicate when, where or how it came about that the liquor was consumed, is not a sufficient basis of fact to bring the word in the section “committing” into play and to establish therefore a breach of the section rendering the arrest lawful” (**R. v. Kelly**).

It is to be noted, however, that the current wording, in addition to requiring a refusal to identify, is directed against a person “found contravening” the act. It might be argued that these changes distinguish **R. v. Kelly** from the current law and that a person under the age of 19 with the smell of liquor on his breath is “found contravening” s.44(3) unless he brings himself within the exception of s.44(7) (supplying of liquor by parent or guardian in a residence).

R. v. Kelly, [1970] 2 O.R. 415 (Ont.C.A.)

-s.54 L.L.A.

Additional Penalty Provisions

Note that the additional penalty provisions in s.55(2), (3) and (4) apply only to s.44(2) [the strict liability offence of selling liquor to a person apparently under 19 years] and do not apply to s.44(1) [the mens rea offence of knowingly selling liquor to a person (actually) under 19 years]. See annotations re: s.44(1) and (2).

-ss.55(2), (3) and (4) L.L.A.

MOTORIZED SNOW VEHICLES' ACT

No Cases

No Comments

PROSECUTORS HANDBOOK
MOTORIZED SNOW VEHICLES' ACT

TRESPASS TO PROPERTY ACT

No Cases

No Comments

BYLAWS**Reverse Onus**

A bylaw prohibited parking unless the owner had a permit affixed to the vehicle. This reverse onus in s.730(2) of the **Code** does not infringe section 11(d) of the **Charter**.

Regina v. Rogers (1984) unreported (Ont. S.C.)

Time

A bylaw may be enacted by a municipality which prohibits certain specified driving manoeuvres, e.g., prohibited left turns, driving certain hours. These hours may fluctuate dependent on the time in effect within the municipality, e.g., Daylight Saving or Eastern Standard.

Regina v. Dantzer (1985) unreported (Ont. C.A.)

GLOSSARY

ABET: Assist, aid or help.

ABSOLUTE LIABILITY OFFENCES: In offences of absolute liability it is not open to the accused to exculpate himself by showing that he was free from fault. (See annotation re: rate of speed, s. 109). A great deal of intellectual debate continues over defining which offences are of absolute, as opposed to strict, liability.

ACTUS REUS: The guilty act. In most indictable offences the Prosecution must prove two elements. The first is that the accused did commit the offence, the guilty act. The Prosecution must also prove that the accused intended to break the law in this way. The second element, that of the guilty mind, is called **MENS REA**.

ADVERSE: A witness who, in the opinion of the Court is **HOSTILE**. **ADVERSE** is not meant to indicate that he is merely against the party by whom he is called as a witness. The party may wish to attack the credibility of a witness. This may not be done by introducing evidence of bad character, but the witness may be contradicted, by leave of the court, by proving that the witness made at some other time a statement inconsistent with his present testimony. See section 23 of the Ontario Evidence Act R.S.O. 1980 c. 145.

A FORTIORI: With stronger reason; more conclusively; all the more so. This is a term used in argument for emphasis.

AB INITIO: From the beginning.

ACQUITTAL: Discharge from prosecution.

AFFIDAVIT: A statement in writing verified by oath of the person making the statement, made for the purpose of production in evidence in any legal proceedings.

AFFIRMATION: A solemn declaration allowed to be made instead of an oath. See Section 17 Ontario Evidence Act R.S.O. 1980 c. 145.

ALIAS: A term used to show that a person has more than one name.

ALIBI: A defence that the accused was somewhere else at the time the crime was committed.

AMICUS CURIAE: "Friend of the court" — applied to one who suggests something for the information of the court e.g., a solicitor of the court who, being present, makes some suggestion to the court in regard to the matter before it, or in regard to some error in the proceedings to which the court's attention should be drawn.

ANTE: A Latin term meaning **BEFORE**.

ANTE MORTEM: Before death, i.e. an **ANTE MORTEM** statement.

ARRAIGNMENT: Having been brought before the court, the accused is then **ARRAIGNED**. That is, he is informed of the charge or charges against him, and asked to plead.

ASSAULT: At **COMMON LAW** an attempt or an indication of an attempt to inflict physical harm on another, coupled with an apparent present ability and an intention to do the act. The actual infliction of physical harm or the unlawful laying of hands on another is called **BATTERY**. Under the Criminal Code, **ASSAULT** includes the **BATTERY** as well.

AUTREFOIS ACQUIT: A French term meaning previously acquitted. Where someone is subject to legal proceedings in a certain matter, he may plead **AUTREFOIS ACQUIT** to have

the proceedings quashed. This plea, in effect, says that he has previously been subject to legal proceedings in the same matter and been acquitted thereof. If he can prove this, these new proceedings will be quashed.

AUTREFOIS CONVICT: A French term meaning previously convicted. As above, it is a plea to have legal proceedings quashed. However, the reason given by he who pleads it is that he was previously convicted in legal proceedings on the very same matter. Again, if he can prove this, these new proceedings will be quashed.

BATTERY: The unlawful laying of hands on another person (at common law).

BENCH WARRANT: A warrant issued by the court to apprehend an offender or absentee.

BONA FIDE: In good faith.

BOND: A legal document by which a person binds himself to do something or to refrain from doing something under penalty of paying a fine or foregoing the return of a deposit already paid.

BURDEN OF PROOF: The obligation resting on a person asserting a fact to prove it.

CERTIORARI: The writ directed to an inferior court to send the record of the proceedings in a certain case to a higher or superior court which will make an inquiry into some aspect of the proceeding as it took place in the inferior court.

CHARGE: An accusation against someone of having committed an offence for which there is a penalty.

CLEAR DAYS: In this calculation of a number of days both the first and the last day are excluded in the calculation. For example, if I sign a note in which I promise to pay you a sum of money in twenty 'clear days' if the day in which I signed the note is June 3rd, then I will have the use of the money for twenty days starting on the 4th and ending the 23rd. I will not be required to pay you until the 24th.

COMMON LAW: The law under which we live is of two separate sources. COMMON LAW, as the original source, is a body of principles and judicial decisions comprising a system of laws which evolved to its present form over many centuries. It started off as rules of usage and custom which have been recognized, affirmed and enforced by the courts in their decisions down through the centuries. The other source of our present day law is the enactment of statutes by Parliament and the Legislatures. This second source, or method of creating law, overrides the first. Wherever a statute conflicts with a rule or doctrine of COMMON LAW, it is the provisions of the statute and not the COMMON LAW rule or doctrine which is the law of the land. For example, section 7. (2) and (3), of the Criminal Code, specifically imports the COMMON LAW as it applies to criminal law insofar as Parliament has not contradicted the COMMON LAW rules in the provisions of the Code.

COMMON LAW DEFENCES: s.7(3) of the Criminal Code preserves any common law defences that pre-existed the code. s.80 of the Provincial Offences Act is to the same effect, "every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of offences, except in so far as they are altered by or inconsistent with this or any other Act." Some of these defences have been given statutory recognition; these include insanity (s.16(1), Cr. Code), infancy (s.12, Cr.Code) and compulsion or duress (s.17, Cr.Code). (Note re: insanity; the impact of an insanity defence in a P.O.A. offence is not that of a custody order at the pleasure of the Lieutenant Governor as per s.542.(2) Cr.Code. That section refers only to indictable

offences. One possible result, however, could be a suspension of the defendant's driver's licence due to a failure to qualify under Ont. Reg. 462, s.7(a)).

Other common law defences are not statutorily recognized but may, nevertheless, have application; these include necessity, *de minimus non curat lex* and practical or commercial impossibility.

Re: Necessity; the essence of this defence is that the defendant was justified in breaking the law because in doing so he averted a greater evil. It would seem that the defence will succeed only in the rarest of circumstances, and that the defence will not arise where the evil might have been averted in some legal manner. For an example of a case where the defence succeeded, see *R. v. Fry* (1977), 36 C.C.C. (2d) 396 (Sask. Mag. Ct.). Here, the defendant was acquitted of dangerous driving, on the grounds that he only drove at dangerous speeds in order to escape from a dangerously driven car behind him. Two Nova Scotia cases have held that necessity may, in the most exceptional circumstances, exist as a defence to speeding. (*R. v. Kennedy* (1972), 7 C.C.C. (2d) 42 (N.S. Co. Ct.) and *R. v. Paul* (1973), 12 C.C.C. (2d) 497 (N.S. Co. Ct.)). Its very limited application, however, can be seen in *R. v. Walker* (1979), 48 C.C.C. (2d) 126 (Ont. Co. Ct.). The defendant, a police officer, ran a stop sign on his way to a bank where an alarm had been set off. Held: The defence of necessity could not succeed, as there was no evidence that the officer was averting a greater evil, or that the harm that he was seeking to avoid was an immediate and physical one. The leading case on necessity is *Morgentaler v. The Queen* (1975) 20 C.C.C. (2d) 449 (S.C.C.).

De Minimus Non Curat Lex means "The Law does not concern itself with trifles". In arguing *de minimus*, the defence is maintaining that the breach of the law is so trivial that no finding of guilt should be made. It is extremely rare for a de minimus defence to be raised, and even rarer for it to succeed. It is most often raised in drug cases, however it is not confined to that area. A rare example of the defence succeeding is found in *R. v. Peleshaty* (1949) 96 C.C.C. 147 (Man. C.A.), a liquor offence prosecution, where the evidence showed that there were only ten drops of liquor in each of two bottles. A more recent example is *R. v. Webster* (1981) 10 M.V.R. 310 (Ont. Dist. Ct.). Here, the defendant was acquitted of parking in a "snow zone" when it was found that there was no snow on the day in question, which was eight days before the end of the snow season. It is to be noted, however, that the Court will be loathe to frustrate the intention of the Legislature by demeaning the offence as too minor to warrant conviction; the matter might better be reflected in sentence.

Re: Practical or Commercial Impossibility see *R. v. Allen* (1979), 59 C.C.C. (2d) 563 (Ont. Dist. Ct.) where in dealing with a violation of maximum allowable axle unit rates (now s.99) the Court held that "it may be that necessity or practical or commercial impossibility may be a defence even to an absolute liability offence."

COMPULSION (OR DURESS): See Common Law Defences

CONDUCT MONEY: This is money paid to witnesses to reimburse them for expenses and as remuneration for appearing in court. See Section 60(2) Ontario Evidence Act R.S.O. 1980 c. 145.

CONTEMPT OF COURT: Disobedience to the rules or orders of a court; showing disrespect. (See Procedure: Contempt of Court)

CORPUS DELECTI: This term does not, as is commonly thought, refer solely to the body of the deceased victim. It means the substance and essence of the crime, all of the elements that go to making the impugned act a breach of law.

CORROBORATION (Corroborative Evidence): Evidence, supplementary to that already given and tending to strengthen or confirm it. Adding weight or credibility to a prior assertion or previous testimony by additional and confirming facts or evidence. For example, section 18 of the Ontario Evidence Act R.S.O. 1980 c. 145, provides that no case where a child of tender years is the principal witness shall be decided upon such evidence unless it is corroborated (supported) by some other material evidence.

CROSS-EXAMINATION: The examination of a witness by the opposite side to that which called him. That opposing side may question the witness in reference to matters raised during the examination-in-chief.

DE FACTO: The actual state of affairs or circumstances without regard to the legality involved as in right or wrong or title. Having regard to the legality of a situation is 'de jure'.

DE NOVO: From the beginning; a second time. **TRIAL DE NOVO** is an order from a higher court directing a lower court of other judicial body to hear, over again from the beginning, a trial it had previously disposed of.

DE MINIMUS NON CURAT LEX: See Common Law Defences.

DOCKET: A list of cases before a court.

DUE DILIGENCE: " . . . if the defence (of exercising all reasonable diligence) exists then its success or failure is to be determined by the trier of fact, . . . [Moris v. The Queen, [1980] 2 S.C.R. 356, 33 N.R. 411, 55 C.C.C. (2d) 558 at 562, 116 D.L.R. (3d) 291 (S.C.C.)]

DURESS: See Common Law Defences

ENACT: To make valid; to create as law.

EX IMPROVISO: Without any preparation.

EX SEQ: Short form for the Latin term 'et sequens', meaning 'and that which follows'.

EXAMINATION-IN-CHIEF: The questioning of a witness by the party who called the witness.

EXHIBIT: A thing or document sworn to and identified by a witness for the purpose of introduction into evidence.

EX PARTE: 'On one side only'. A judicial proceeding is said to be 'EX PARTE' when it is taken or determined at the instance of only one party without notice to, or in the absence of, the opposing party in the action. For example, a summary convictions court, under s.738(3) of the Code, where the defendant fails to appear in response to a summons, has the discretion to hear and dispose of the case 'EX PARTE', in the absence of the defendant.

FACSIMILE: An exact copy.

GAOL: The old English spelling of jail.

GRAVAMEN: The material part, gist, essence, substance or burden or a charge.

HABEAS CORPUS: A writ requiring that someone held in custody be brought before a court to decide the legality of his imprisonment.

HODGE'S CASE: The rule in Hodge's Case (1838), 168 E.R. 1136, is stated in the headnote as "where a charge depends on circumstantial evidence, it ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion." Application of the

rule: the words “rational conclusion” do not encompass “every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused,” [R. v. Torrie, [1967] 2 O.R. 8 (Ont.C.A.)], rather they refer to “rational conclusions based on inferences drawn from proven facts (founded on evidence) [R. v. McIver, [1967] 1 O.R. 306 at 309 (Ont.H.C.J.)]. Further, the rule is applicable only to the determination of physical acts (actus reus) and not to the mental states (mens rea etc.) involved. See the judgement of Spence J. in R. v. Mitchell (1964), 46 D.L.R. (2d) 384 at 394 (S.C.C.). See also Delisle, R., J., Evidence: Principles and Problems (1984) pp. 58-64.

ILLEGAL: Contrary to a specific law which forbids it.

IN CAMERA: A private hearing of a case where only those directly involved and their counsel are allowed to be present; to which public does not have access as of right.

IN RE: In the matter of.

INTER ALIA: Among other things.

IRREGULARITY: An omission in the proper procedure or formalities.

JURAT: Certificate of officer or person before whom an affidavit has been duly sworn, by the affiant, indicating that the affidavit was properly made before a duly authorized officer.

JURIDICAL DAY: Legal day for a court sitting. Weekends and legal holidays are not juridical days.

JURISDICTION: This term is used in two different senses. A court must have the lawful right to hear and decide the matter within the specific geographic bounds which it is assigned. Section 720(1) of the Criminal Code defines ‘Summary Conviction Court’ as “a person who has jurisdiction in the territorial division where a subject-matter of the proceedings is alleged to have arisen”. In the second sense, jurisdiction is used to denote the lawful right (specifically provided for by law) to hear and decide a specific type of matter. For example section 483(a)(i) specifically gives a Provincial Court Judge absolute jurisdiction (the sole right) to hear a case where the accused is charged with theft of anything, except a testamentary instrument, of a value not exceeding \$200.00. However according to section 427 and 429.1 of the Criminal Code, a Provincial Court Judge does not have jurisdiction to hear a case where the accused is charged with treason.

LIMITATION PERIOD: The time within which a charge must be laid after the commission of an offence or within which any other proceeding may be instituted. For example section 721 (2) provides that “No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose”. (Summary convictions)

MANDAMUS: A writ by which a court orders a lower court or an official to do something which he is obligated to do by law, but has previously refused to do.

MENS REA: The guilty mind. MENS REA consists of some positive state of mind such as intent, knowledge or recklessness. Along with ACTUS REUS, (the guilty act), MENS REA is required to be proved by the prosecution in order to obtain a conviction in many indictable offences. See ACTUS REUS above.

MISTAKE OF FACT: A reasonable but mistaken view of a set of facts which, if true, would render the act or omission innocent constitutes the defence of due diligence re: a strict liability offence. (See Evidence: Mistake of Fact)

MUTATIS MUTANDIS: The necessary changes having been made. For example, section 3 of

the Summary Convictions Act used to import part XIX of the Criminal Code as being part of the Summary Convictions Act but qualified the incorporation as 'MUTATIS MUTANDIS'. Section 627(1) of the Criminal Code Part XIX dealt with the issuance of a SUBPOENA by any court other than one in which a magistrate presides. This sub-section would have to be deleted from Part XIX for the purposes of the Summary Convictions Act. As another example, section 627(2) mentions the word MAGISTRATE. For Ontario purposes the change which would have to be made is that the word MAGISTRATE would be changed to read PROVINCIAL JUDGE.

NECESSITY: See Common Law Defences

OBITER DICTUM: An expression of opinion by the court on a matter incidental to the main issue and, therefore, even though it is reported along with the rest of its decision in the case, it is not to be taken as authoritative or binding on lower courts.

OPEN COURT: One to which the public and the press is allowed access. Opposite of IN CAMERA (defined above).

ORAL: Oral evidence is evidence given by word of mouth in the witness box.

PEACE OFFICER: Section 2 of the Criminal Code defines 'peace officer' as including a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and Justice of the Peace, a warden, deputy warden, instructor, keeper, gaoler, guard, and any other officer or permanent employee of a prison, a police officer, police constable, bailiff, constable, or other persons employed for the preservation and maintenance of the public peace or for the service of execution of civil process, a customs or excise officer acting under the Customs Act or the Excise Act, the pilot in command of an aircraft while the aircraft is in flight, and officers and men of the Canadian Forces assigned the powers of 'peace officers' under the National Defence Act.

PENAL LAWS: Laws imposing punishment and/or penalties for crimes.

PER SE: By or of itself; taken alone.

'PERFECTING' SOME PROCEEDING: Completing or fulfilling the requirements of a particular proceeding where there was previously an omission therein.

PLAINTIFF: One who brings a personal action against someone.

POST: A Latin prefix meaning after. i.e. POST MORTEM meaning after death.

PRIMA FACIE: At first sight, on the first impression. A PRIMA FACIE case is one where the prosecution has provided sufficient proof that the defendant could be convicted in the absence of any evidence from the defence. PRIMA FACIE evidence indicates that there is enough evidence to support a presumption of the existence of a certain set of facts unless the contrary can be proved.

RE: Concerning; regarding; in the matter of.

RECOGNIZANCE: An obligation, entered into by the offender to do or refrain from doing a particular thing(s) specified by the court.

RECORD: Official court papers concerning case.

REGINA: The Queen.

RESERVED JUDGMENT: After hearing the evidence and argument from both sides in a trial, if the presiding Judge or Justice desires time to think about the case, consider some rele-

vant point of law or requests written arguments from both sides he will RESERVE judgment until a later date. (See s.574(4) Cr.Code).

RES GESTAE: The whole of the incident under consideration, every part of it. Where, ordinarily, an element of the incident would not be admissible (as for example a statement by an accused about an accident to a bystander or the act of offering the driver of the other car money immediately after the accident) by arguing that the element is so much an integral part of the entire incident as to qualify its character and significance, the element may, then, be allowed into evidence.

RES IPSA LOQUITUR: simply means that from certain proved facts, an inference of negligence arises. Such inference is justified as an inference of fact legitimately arising out of the facts established by the evidence.

Gauthier & Co. v. R., [1945] S.C.R. 143, [1945] 2 D.L.R. 48 (S.C.C.)

RESPONDENT: The defendant in an appeal.

REX: The King. When there is a King on the throne, the name of the Crown as prosecuting in criminal cases is represented as REX. Currently, as there is a Queen on the throne, prosecutions by the Crown are represented as Regina. The designation 'R.' (R. v. Smith) is a short form representative of either Regina or Rex.

REBUTTABLE PRESUMPTION: Section 16(4) of the Criminal Code provides "Everyone shall, until the contrary is proved, be presumed to be and to have been sane." In effect, section 16(4) sets out a REBUTTABLE PRESUMPTION. A person is presumed to be sane unless and until the defence is able to rebut or disprove that presumption. Section 19 of the Criminal Code provides "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence." This section provides an IRREBUTTABLE PRESUMPTION. That every accused is presumed to know the law cannot be denied or disproved by the accused.

SCIENTER: Knowledge, particularly the defendant's previous knowledge of the cause which led to the injury complained of, or previous knowledge of a state of facts, e.g., knowledge of an owner of an animal concerning the mischievous propensities or viciousness of the beast, which it was his duty to guard against.

SINE DIE: Without an appointed day. An adjournment sine die is one in which no future date is set for the recommencement or continuation of the matter.

STARE DECISIS: (pronounced 'Staree desaeisis') It is a Latin phrase meaning "to stand beside things decided." It is a legal doctrine which binds the court to decisions previously made in similar cases by higher courts in the same jurisdiction. A Provincial Court Judge will consider himself bound by previous decisions, probably, of District and County Court of the district or county in which he himself sits, certainly of the Ontario Supreme Court (Trial and Appeal Division) and the Supreme Court of Canada (especially where it was an Ontario case which was considered). Decisions of the Privy Council in England decided before appeal to it from Supreme Court of Canada was abolished would probably also be binding. Where there is no binding decision on a matter in Ontario which would bind the presiding Provincial Judge or Justice, he may consider cases decided in other Provinces, England, or other commonwealth countries or the United States, but he may not consider them binding. In effect, STARE DECISIS is a system of legislating by courts, since it is a system of laying down the law where no statute yet applies. However, the court is always subject, in provincial matters, to Acts of the Legislature, and in federal matters, to Acts of Parliament. It is Parliament and the Legislatures which have ultimate authority to create laws.

STRICT LIABILITY OFFENCES: In strict liability offences there is no necessity for the prosecution to prove the existence of **MENS REA**; the doing of the prohibited act, **PRIMA FACIE**, imports the offence leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man could have done in the circumstances. The defence will be available if the accused reasonably but mistakenly believed in a set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. (*R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 21 N.R. 295 (S.C.C.))

SUBPOENA: An order directed to a person who is likely to give material evidence at the trial commanding him to appear and give evidence, and bring documents, where required.

SUMMONS: A direction summoning a defendant to appear before a Provincial Judge or Justice of the Peace.

TO WIT: That is to say. It is a term of rhetoric used in argument by legal counsel, being much more impressive than 'for example', 'e.g.' or 'i.e.' . . . or is it.

ULTRA VIRES: Beyond the powers. According to the Canadian Constitution, it is **ULTRA VIRES** the Ontario Legislature to enact laws relating to crimes.

VENUE: The locality where the offence was committed; the place of trial.

VERDICT: The finding of a jury, court, or coroner, upon hearing the evidence and arguments in a matter before them.

VOIR DIRE: (pronounced vwar deer) It is French and means 'to see to say'. In effect, it is a procedure for a trial within a trial. Where during a trial one of the parties wishes to introduce some point of evidence which the other party contends is inadmissible, the presiding Judge or Justice must halt the initial proceeding, and, where there is a jury, send the jury out of the courtroom. He then hears a trial on the issue of admissibility of this evidence as a separate matter. After deciding this issue, the trial is continued from the point of the interruption. Where there is a jury it is called back into the courtroom and the trial proceeds.

WARRANT: A written legal document authorizing and requiring a person, usually a peace officer, to perform a specific task such as making an arrest.

CITATION OF CASES

Regina v. Moses
[1970] 3 O.R.314

- [1970] is the year this case is reported and the square brackets indicate that the year is the major enumeration system used by this set of reports.
- — ‘3’ is the yearly volume number where the particular case is reported.
- ‘O.R.’ stands for ‘Ontario Reports’
- ‘314’ is the page number the report starts at.

Vana v. Tosta
(1968) 66 D.L.R.
(2d) 97, at 104

- (1968) is the year in which the case was reported but volumes are not numbered as to the year.
- ‘66’ is the volume number instead of being numbered according to the year and volume as in the O.R.’s above,
- ‘D.L.R.’ — Dominion Law Reports
- ‘(2d)’ indicates that this volume number is to be found among a second series of reports. After reaching a certain volume number, the publisher started with volume 1 (one) again but added ‘(2d)’ to prevent confusion with the volume numbers of the first series.
- ‘97’ is the page at which the report begins
- ‘at 104’ indicates that a particular quotation or argument is to be found on a page within the report.

SOME REPORTING SERVICES

O.R.	— Ontario Reports
D.L.R.	— Dominion Law Reports
S.C.R.	— Supreme Court Reports
O.L.R.	— Ontario Law Reports (O.R. before 1931)
C.E.D.	— Canadian Encyclopaedic Digest
O.W.N.	— Ontario Weekly Notes
C.C.C.	— Canadian Criminal Cases
C.R.	— Criminal Reports
C.R.N.S.	— Criminal Reports New Series
W.W.R.	— Western Weekly Reports
Q.B.	— Queens Bench (England)
All E.R.	— All England Reports (England)
A.C.	— Appeal Cases (England)
Cox C.C.	— Cox Criminal Cases (old English series)
Cr.App.R.	— Criminal Appeal Reports (England)

CITATION OF STATUTES

The Highway Traffic
Act R.S.O. 1980 c.
198 s.81

R.S.O. — Revised Statutes of Ontario 1980 — the latest revision which took place (a revision is a collection or consolidation of all the amendments up to that time)

— c. 198 — the chapter allotted the particular statute in the revision

— s. 81 — the section of the Act being referred to

The Summary Con-
victions Act R.S.O.
1970 c. 450
as amended in S.O.
1971, vol. 2, c. 10

This means that since the revision of 1970, the Summary Convictions Act had been amended. In order to find out what the law was under this Act, one must read both the initial Act as published in Chapter 450 of the Revised Statutes of Ontario and the amendments in the Statutes of Ontario, 1971, Volume 2, and found in Chapter 10.

MORE STATUTES

R.S.O. — Revised Statutes of Ontario

S.O. — Statutes of Ontario

R.S.C. — Revised Statutes of Canada

S.C. — Statutes of Canada

Statutes of Ontario and Canada are revised or updated with all amendments in a consolidated form, usually every ten years. The latest revision of both Statutes was 1980.

R.R.O. — Revised Regulations of Ontario

R.O. — Regulations of Ontario.

Many statutes passed by the Legislature are in general form and express a policy with regard to a certain matter. They then require details about application of the sections such as specifications or penalties to be set out later and if necessary to be varied to meet changing times and conditions. Authority to make such regulations for provincial legislation is usually given to the Lieutenant Governor in Council. The term 'in Council' merely means that the Cabinet of the governing party will decide on the regulations and when these regulations have been signed by the Lieutenant Governor, it becomes law as if passed by the Legislature itself. This system saves the Legislature from having to spend a great deal of valuable time, unnecessarily, on minor details. Power to make such regulations is sometimes given to other officials such as registrars or commissioners. The authority for this delegation of legislative power is the Regulations Act R.S.O. 1980 c. 446.

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CANADIAN CHARTER OF RIGHTS AND FREEDOMS –
SECTION 51-5.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Being Part I of the Constitution Act, 1982

Amended by the Constitution Amendment Proclamation, 1983, effective
June 21, 1984

Whereas Canada is founded upon principles that recognize the
supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

RIGHTS AND FREEDOMS IN CANADA.

1.. The *Canadian Charter of Rights and Freedoms* guarantees the
rights and freedoms set out in it subject only to such reasonable limits
prescribed by law as can be demonstrably justified in a free and demo-
cratic society.

Fundamental Freedoms

FUNDAMENTAL FREEDOMS.

2.. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including
freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Democratic Rights

DEMOCRATIC RIGHTS OF CITIZENS.

3.. Every citizen of Canada has the right to vote in an election of mem-
bers of the House of Commons or of a legislative assembly and to be qual-
ified for membership therein.

**MAXIMUM DURATION OF LEGISLATIVE BODIES — Continuation in special
circumstances.**

4.. (1) No House of Commons and no legislative assembly shall con-
tinue for longer than five years from the date fixed for the return of the
writs at a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a
House of Commons may be continued by Parliament and a legislative
assembly may be continued by the legislature beyond five years if such
continuation is not opposed by the votes of more than one-third of the
members of the House of Commons or the legislative assembly, as the
case may be.

ANNUAL SITTING OF LEGISLATIVE BODIES.

5.. There shall be a sitting of Parliament and of each legislature at least
once every twelve months.

Mobility Rights

MOBILITY OF CITIZENS — Rights to move and gain livelihood — Limitation — Affirmative action programs.

6.. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

LIFE, LIBERTY AND SECURITY OF PERSON.

7.. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

SEARCH OR SEIZURE.

8.. Everyone has the right to be secure against unreasonable search or seizure.

DETENTION OR IMPRISONMENT.

9.. Everyone has the right not to be arbitrarily detained or imprisoned.

ARREST OR DETENTION.

10.. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

PROCEEDINGS IN CRIMINAL AND PENAL MATTERS.

11.. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

CANADIAN CHARTER OF RIGHTS AND FREEDOMS –
SECTIONS 11.-15.

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

TREATMENT OR PUNISHMENT.

12.. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

SELF-CRIMINATION.

13.. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

INTERPRETER.

14.. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

EQUALITY BEFORE AND UNDER LAW AND EQUAL PROTECTION AND
BENEFIT OF LAW — Affirmative action programs.

15.. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

OFFICIAL LANGUAGES OF CANADA — Official languages of New Brunswick — Advancement of status and use.

16.. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Chapter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

PROCEEDINGS OF PARLIAMENT — Proceedings of New Brunswick legislature.

17.. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

PARLIAMENTARY STATUTES AND RECORDS — New Brunswick statutes and records.

18.. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

PROCEEDINGS IN COURTS ESTABLISHED BY PARLIAMENT — Proceedings in New Brunswick courts.

19.. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

COMMUNICATIONS BY PUBLIC WITH FEDERAL INSTITUTIONS — Communications by public with New Brunswick institutions.

20.. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

- (a) there is a significant demand for communications with and services from that office in such language; or
- (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an

CANADIAN CHARTER OF RIGHTS AND FREEDOMS –
SECTIONS 20.-24.

institution of the legislature or government of New Brunswick in English or French.

CONTINUATION OF EXISTING CONSTITUTIONAL PROVISIONS.

21.. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

RIGHTS AND PRIVILEGES PRESERVED.

22.. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

LANGUAGE OF INSTRUCTION — Continuity of language instruction — Application where numbers warrant.

23.. (1) Citizens of Canada

- (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
- (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

- (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
- (b) includes, where the number of these children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS — Exclusion of evidence bringing administration of justice into disrepute.

24.. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 24.—Continued

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General**ABORIGINAL RIGHTS AND FREEDOMS NOT AFFECTED BY CHARTER.**

25.. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. [Amended by Constitution Amendment Proclamation, 1983, s. 1.]

OTHER RIGHTS AND FREEDOMS NOT AFFECTED BY CHARTER.

26.. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

MULTICULTURAL HERITAGE.

27.. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

RIGHTS GUARANTEED EQUALLY TO BOTH SEXES.

28.. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

RIGHTS RESPECTING CERTAIN SCHOOLS PRESERVED.

29.. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

APPLICATION TO TERRITORIES AND TERRITORIAL AUTHORITIES.

30.. A reference in this Chapter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

LEGISLATIVE POWERS NOT EXTENDED.

31.. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter**APPLICATION OF CHARTER — Exception.**

32.. (1) This Charter applies

CANADIAN CHARTER OF RIGHTS AND FREEDOMS –
SECTIONS 32.-34.

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

EXCEPTION WHERE EXPRESS DECLARATION — Operation of exception — Five year limitation — Re-enactment — Five year limitation.

33.. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

CITATION.

34.. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

CHAPTER 11

Extracts from the Courts of Justice Act

66.—(1) The provincial courts (criminal division) for the counties and districts are amalgamated and continued as a single court of record named the Provincial Court (Criminal Division).

Provincial
Court
(Criminal
Division)

(2) The Provincial Court (Criminal Division) shall be presided over by a provincial judge. R.S.O. 1980, c. 398, s. 14.

Judge to
preside

67.—(1) A provincial judge shall exercise the powers and perform the duties vested in him or her as a magistrate, provincial magistrate or one or more justices of the peace under section 61 sitting in the Provincial Court (Criminal Division). R.S.O. 1980, c. 398, s. 15, 1984, c. 64, s. 2.

Exercise of
criminal
jurisdiction

(2) The Provincial Court (Criminal Division) is a youth court for the purposes of the *Young Offenders Act* (Canada). 1984, c. 64, s. 3 (2).

PROVINCIAL OFFENCES COURT

68.—(1) The provincial offences courts for the counties and districts are amalgamated and continued as a single court of record named the Provincial Offences Court.

Provincial
Offences
Court

(2) The Provincial Offences Court shall be presided over by a provincial judge or justice of the peace. R.S.O. 1980, c. 398, s. 18 (1).

Judge or
justice of the
peace to
preside

69. The Provincial Offences Court shall perform any function assigned to it by or under the *Provincial Offences Act* or any other Act. R.S.O. 1980, c. 398, s. 18 (2).

Jurisdiction
R.S.O. 1980,
c. 400

70.—(1) A proceeding in the Provincial Offences Court against a young person as defined in the *Provincial Offences Act* shall be conducted in the Provincial Court (Family Division) or, in the Judicial District of Hamilton-Wentworth, in the Unified Family Court, sitting as the Provincial Offences Court. 1983, c. 80, s. 2 (2).

Sittings:
young
persons

Chap. 11

COURTS OF JUSTICE

Sec. 5 (2)

(1a) A proceeding in the Provincial Offences Court under Part III (Child Protection) or Part VII (Adoption) of the *Child and Family Services Act, 1984* shall be conducted in the Provincial Court (Family Division) or, in the Judicial District of Hamilton-Wentworth in the Unified Family Court, sitting as the Provincial Offences Court. 1984, c. 55, s. 213 (3)

Joint sittings

(2) Where a proceeding in which the Provincial Offences Court has jurisdiction is conducted during the course of a sitting of the Provincial Court (Criminal Division) or Provincial Court (Family Division), the proceeding shall be deemed to be conducted in the Provincial Offences Court. R.S.O. 1980, c. 398, s. 19 (2).

Contempt

71.—(1) Except as otherwise provided by an Act, every person who commits contempt in the face of the Provincial Offences Court is on conviction liable to a fine of not more than \$1,000 or to imprisonment for a term of not more than thirty days, or to both.

Statement to offender

(2) Before proceedings are taken for contempt under subsection (1), the court shall inform the offender of the conduct complained of and the nature of the contempt and inform him or her of the right to show cause why he or she should not be punished.

Show cause

(3) A punishment for contempt in the face of the court shall not be imposed without giving the offender an opportunity to show cause why he or she should not be punished.

Adjournment for adjudication

(4) Except where, in the opinion of the court, it is necessary to deal with the contempt immediately for the preservation of order and control in the courtroom, the court shall adjourn the contempt proceeding to another day.

Adjudication by judge

(5) Where a contempt proceeding is adjourned to another day under subsection (4), the contempt proceeding shall be heard and determined by the court presided over by a provincial judge.

Arrest for immediate adjudication

(6) Where the court proceeds to deal with a contempt immediately and without adjournment under subsection (4), the court may order the offender arrested and detained in the courtroom for the purpose of the hearing and determination.

Barring agent in contempt

(7) Where the offender is appearing before the court as an agent who is not a barrister and solicitor entitled to practise in Ontario, the court may order that he or she be barred from acting as agent in the proceeding in addition to any other punishment to which he or she is liable.

Sec. 9 (1)

COURTS OF JUSTICE

Chap. 11

(8) An order of punishment for contempt under this section is appealable in the same manner as if it were a conviction in proceedings commenced by certificate under Part I of the *Provincial Offences Act*.

Appeals

R.S.O. 1980,
c. 400

(9) The *Provincial Offences Act* applies for the purpose of enforcing a punishment by way of a fine or imprisonment under this section. R.S.O. 1980, c. 398, s. 20.

Enforcement
R.S.O. 1980,
c. 400

72. Any person who knowingly disturbs or interferes with the proceedings of the Provincial Offences Court, without reasonable justification, while outside the courtroom is guilty of an offence and on conviction is liable to a fine of not more than \$1,000 or to imprisonment for a term of not more than thirty days, or to both. R.S.O. 1980, c. 398, s. 21.

Penalty for
disturbance
outside
courtroom

73.—(1) There shall be a Rules Committee of the Provincial Offences Court composed of such members as are appointed by the Lieutenant Governor in Council who shall designate one of the members to preside over the Committee.

Rules
Committee

(2) A majority of the members of the Rules Committee constitutes a quorum. *New.*

Quorum

(3) Subject to the approval of the Lieutenant Governor in Council, the Rules Committee of the Provincial Offences Court may make rules,

Rules

- (a) regulating any matters relating to the practice and procedure of the Provincial Offences Court;
- (b) prescribing forms respecting proceedings in the court;
- (c) regulating the duties of the clerks and employees of the court;
- (d) prescribing and regulating the procedures under any Act that confers jurisdiction on the Provincial Offences Court or a judge or justice of the peace sitting therein;
- (e) prescribing any matter that is referred to in an Act as provided for by the rules of the Provincial Offences Court. R.S.O. 1980, c. 398, s. 22.

122.—(1) Where the constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature or of a regulation or by-law made thereunder is in question, the Act, regulation or by-law shall not be

Constitu-
tional
questions

4	Chap. 11	COURTS OF JUSTICE	Sec. 9 (1)
			adjudged to be invalid or inapplicable unless notice has been served on the Attorney General of Canada and the Attorney General of Ontario in accordance with subsection (2).
Form and time of notice		(2)	The notice shall be in the form provided for by the Rules of Civil Procedure and, unless the court orders otherwise, shall be served at least ten days before the day on which the question is to be argued.
Notice of appeal		(3)	Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.
Right of Attorneys General to be heard		(4)	Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.
Right of Attorneys General to appeal		(5)	Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question. R.S.O. 1980, c. 223, s. 35.
Proceeding in wrong forum		123. —(1)	Where a proceeding or a step in a proceeding is brought or taken before the wrong court, judge or officer, it may be transferred or adjourned to the proper court, judge or officer.

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PART XIV

COMPELLING APPEARANCE OF ACCUSED BEFORE A
JUSTICE AND INTERIM RELEASE*Interpretation*

Definitions — “Accused” — “Appearance notice” — “Officer in charge” — “Promise to appear” — “Recognizance” — “Summons” — “Undertaking” — “Warrant”.

448. In this Part

“accused” includes

(a) a person to whom a peace officer has issued an appearance notice under section 451, and

(b) a person arrested for a criminal offence;

“appearance notice” means a notice in Form 8.1 issued by a peace officer;

“judge” means

(a) in the Province of Ontario, a judge of the superior court of criminal jurisdiction of the province or a judge or junior judge of a county or district court,

(b) in the Province of Quebec, a judge of the superior court of criminal jurisdiction of the province or three judges of the sessions of the peace or of the provincial court,

(c) in the Provinces of Nova Scotia, Manitoba and British Columbia, a judge of the superior court of criminal jurisdiction of the province or a judge of a county court,

(d) in the Province of Newfoundland, a judge of the superior court of criminal jurisdiction of the Province or a judge of a district court,

(d.1) in the Provinces of New Brunswick, Alberta and Saskatchewan, a judge of the superior court of criminal jurisdiction of the province,

(e) in the Province of Prince Edward Island, the Yukon Territory and the Northwest Territories, a judge of the Supreme Court;

“officer in charge” means the officer for the time being in command of the police force responsible for the lock-up or other place to which an accused is taken after arrest or a peace officer designated by him for the purposes of this Part who is in charge of such place at the time an accused is taken to that place to be detained in custody;

“promise to appear” means a promise in Form 8.2 given to an officer in charge;

“recognizance”, when used in relation to a recognizance entered into before an officer in charge, means a recognizance in Form 8.3, and when used in relation to a recognizance entered into before a justice or a judge, means a recognizance in Form 28;

“summons” means a summons in Form 6 issued by a justice or a judge;

“undertaking” means an undertaking in Form 9 given to a justice or a judge;

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“warrant”, when used in relation to a warrant for the arrest of a person, means a warrant in Form 7 and, when used in relation to a warrant for the committal of a person, means a warrant in Form 8. R.S., c. C-34, s. 448; R.S., c. 2 (2nd Supp.), s. 5; 1972, c. 17, s. 2; 1974-75-76, c. 48, s. 25.

Arrest Without Warrant and Release from Custody

Arrest without warrant by any person — Arrest by owner, etc. of property — Delivery to peace officer.

449. (1) Any one may arrest without warrant
- (a) a person whom he finds committing an indictable offence, or
 - (b) a person who, on reasonable and probable grounds, he believes
 - (i) has committed a criminal offence, and
 - (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.
- (2) Any one who is
- (a) the owner or a person in lawful possession of property, or
 - (b) a person authorized by the owner or by a person in lawful possession of property,

may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

(3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer. R.S., c. C-34, s. 449; R.S., c. 2 (2nd Supp.), s. 5.

Arrest without warrant by peace officer — Limitation — Consequences of arrest without warrant.

450. (1) A peace officer may arrest without warrant
- (a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence,
 - (b) a person whom he finds committing a criminal offence, or
 - (c) a person in respect of whom he has reasonable and probable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXV in relation thereto, is in force within the territorial jurisdiction in which the person is found. R.S.C. 1985, c. 19, s. 76.
- (2) A peace officer shall not arrest a person without warrant for
- (a) an indictable offence mentioned in section 483,
 - (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
 - (c) an offence punishable on summary conviction,
- in any case where
- (d) he has reasonable and probable grounds to believe that the public interest, having regard to all the circumstances including the need to
 - (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence, or

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- (iii) prevent the continuation or repetition of the offence or the commission of another offence,
may be satisfied without so arresting the person, and
- (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend in court in order to be dealt with according to law.
- (3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of
 - (a) any proceedings under this or any other Act of Parliament, and
 - (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).
R.S., c. C-34, s. 450; R.S., c. 2 (2nd Supp.), s. 5.

Issue of appearance notice by peace officer.

451. Where, by virtue of subsection 450(2), a peace officer does not arrest a person, he may issue an appearance notice to the person if the offence is

- (a) an indictable offence mentioned in section 483,
- (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
- (c) an offence punishable on summary conviction. R.S., c. C-34, s. 451; R.S., c. 2 (2nd Supp.), s. 5.

Release from custody by peace officer — Where subsection (1) does not apply —
Consequences of non-release.

452. (1) Where a peace officer arrests a person without warrant for
- (a) an indictable offence mentioned in section 483,
 - (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
 - (c) an offence punishable on summary conviction,
- he shall, as soon as practicable,
- (d) release the person from custody with the intention of compelling his appearance by way of summons, or
 - (e) issue an appearance notice to the person and thereupon release him,
- unless
- (f) he has reasonable and probable grounds that it is necessary in the public interest, having regard to all the circumstances including the need to
 - (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence, or
 - (iii) prevent the continuation or repetition of the offence or the commission of another offence,
- that the person be detained in custody or that the matter of his release from custody be dealt with under another provision of this Part, or

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(g) he has reasonable and probable grounds to believe that, if the person is released by him from custody, the person will fail to attend in court in order to be dealt with according to law.

(2) Subsection (1) does not apply in respect of a person who has been arrested without warrant by a peace officer for an offence described in subsection 454(2).

(3) A peace officer who has arrested a person without warrant for an offence described in subsection (1) and who does not release the person from custody as soon as practicable in the manner described in paragraph (d) or (e) of that subsection shall be deemed to be acting lawfully and in the execution of his duty for the purposes of

- (a) any proceedings under this or any other Act of Parliament, and
- (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (1). R.S., c. C-34, s. 452; R.S., c. 2. (2nd Supp.), s. 5.

Release from custody by officer in charge — Where subsection (1) does not apply — Consequences of non-release.

453. (1) Where a person who has been arrested without warrant by a peace officer is taken into custody, or where a person who has been arrested without warrant and delivered to a peace officer under subsection 449(2) is detained in custody under subsection 454(1) for

- (a) an indictable offence mentioned in section 483,
- (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction,
- (c) an offence punishable on summary conviction, or
- (d) any other offence that is punishable by imprisonment for five years or less,

and has not been taken before a justice or released from custody under any other provision of this Part, the officer in charge shall, as soon as practicable,

- (e) release the person with the intention of compelling his appearance by way of summons,
- (f) release the person upon his giving his promise to appear,
- (g) release the person upon his entering into a recognizance before the officer in charge without sureties in such amount not exceeding five hundred dollars as the officer in charge directs, but without deposit of money or other valuable security, or
- (h) if the person is not ordinarily resident in the province in which he is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, release the person upon his entering into a recognizance before the officer in charge without sureties in such amount not exceeding five hundred dollars as the officer in charge directs and, if the officer in charge so directs, upon his depositing with the officer in charge such sum of money or other valuable security not exceeding in amount or value five hundred dollars, as the officer in charge directs,

unless

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- (i) he has reasonable and probable grounds to believe that it is necessary in the public interest, having regard to all the circumstances including the need to
 - (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence, or
 - (iii) prevent the continuation or repetition of the offence or the commission of another offence,

that the person be detained in custody or that the matter of his release from custody be dealt with under another provision of this Part, or

- (j) he has reasonable and probable grounds to believe that, if the person is released by him from custody, the person will fail to attend in court in order to be dealt with according to law. R.S.C. 1985, c. 19, s. 186.

(2) Subsection (1) does not apply in respect of a person who has been arrested without warrant by a peace officer for an offence described in subsection 454(2).

(3) An officer in charge who has the custody of a person taken into or detained in custody for an offence described in subsection (1) and who does not release the person from custody as soon as practicable in the manner described in paragraph (e), (f), (g) or (h) of that subsection shall be deemed to be acting lawfully and in the execution of his duty for the purposes of

- (a) any proceedings under this or any other Act of Parliament, or
- (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the officer in charge did not comply with the requirements of subsection (1). R.S., c. C-34, s. 453; R.S., c. 2 (2nd Supp.), s. 5.

Release from custody by officer in charge where arrest made with warrant.

453.1. Where a person who has been arrested with a warrant by a peace officer is taken into custody for

- (a) an indictable offence mentioned in section 483,
- (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction,
- (c) an offence punishable on summary conviction, or
- (d) any other offence that is punishable by imprisonment for five years or less,

the officer in charge may, if the warrant has been endorsed by a justice under subsection 455.3(6),

- (e) release the person upon his giving his promise to appear,
- (f) release the person upon his entering into a recognizance before the officer in charge without sureties in such amount not exceeding five hundred dollars as the officer in charge directs, but without deposit of money or other valuable security, or
- (g) if the person is not ordinarily resident in the province in which he is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, release the person upon his entering into a recognizance before the officer in charge without sureties in such amount not exceeding five hun-

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dred dollars as the officer in charge directs and, if the officer in charge so directs, upon his depositing with the officer in charge such sum of money or other valuable security not exceeding in amount or value five hundred dollars, as the officer in charge directs. R.S.C. 1985, c. 19, s. 186.

Money or other valuable security to be deposited with justice.

453.2. Where a person has, pursuant to paragraph 453(1)(h) or paragraph 453.1(g), deposited any sum of money or other valuable security with the officer in charge, the officer in charge shall, forthwith after the deposit thereof, cause the money or valuable security to be delivered to a justice for deposit with the justice. R.S., c. 2 (2nd Supp.), s. 5.

Contents of appearance notice, promise to appear and recognizance — *Idem* — Attendance for purposes of Identification of Criminals Act — Execution of appearance notice, promise to appear or recognizance — Signature of accused — Proof of issue of appearance notice.

453.3. (1) An appearance notice issued by a peace officer or a promise to appear given to, or a recognizance entered into before, an officer in charge shall

- (a) set out the name of the accused,
- (b) set out the substance of the offence that the accused is alleged to have committed, and
- (c) require the accused to attend court at a time and place to be stated therein and to attend thereafter as required by the court in order to be dealt with according to law. R.S.C. 1985, c. 19, ss. 77(1) and (2).

(2) An appearance notice by a peace officer or a promise to appear given to, or a recognizance entered into before, an officer in charge shall set out the text of subsections 133(5) and (6) and section 453.4. R.S.C. 1985, c. 19, s. 77(3).

(3) An appearance notice issued by a peace officer or a promise to appear given to, or a recognizance entered into before an officer in charge may, where the accused is alleged to have committed an indictable offence, require the accused to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act*, and a person so appearing is deemed, for the purposes only of that *Act*, to be in lawful custody charged with an indictable offence. R.S.C. 1985, c. 19, s. 77(3).

(4) An accused shall be requested to sign in duplicate his appearance notice, promise to appear or recognizance and, whether or not he complies with such request, one of the duplicates shall be given to him, but if he fails or refuses to sign, the lack of his signature does not invalidate the appearance notice, promise to appear or recognizance, as the case may be. R.S.C. 1985, c. 19, s. 77(3).

(5) The issue of an appearance notice by any peace officer may be proved by the oral evidence, given under oath, of the officer who issued it or by his affidavit made before a justice or other person authorized to administer oaths or to take affidavits. R.S.C. 1985, c. 19, s. 77(3).

453.4. Where an accused who is required by an appearance notice or promise to appear or by a recognizance entered into before an officer in charge to appear at a time and place stated therein for the purposes of the

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Identification of Criminals Act does not appear at that time and place, a justice may, where the appearance notice, promise to appear or recognizance has been confirmed by a justice under section 455.4, issue a warrant for the arrest of the accused for the offence with which he is charged. R.S., c. 2 (2nd Supp.), s. 5.

Appearance of Accused Before Justice

Taking before justice — Conditional release — Remand in custody for return to province where offence alleged to have been committed — Interim release — Release of person about to commit indictable offence — Consequences of non-release.

454. (1) A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 449(3) shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law, namely:

- (a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and
- (b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible,

unless, at any time before the expiration of the time prescribed in paragraph (a) or (b) for taking the person before a justice,

- (c) the peace officer or officer in charge releases the person under any other provision of this Part, or
- (d) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (3) or otherwise conditionally or unconditionally, and so releases him.

(1.1) Where a peace officer or an officer in charge is satisfied that a person described in subsection (1) should be released from custody conditionally, he may, unless the person is detained in custody for an offence mentioned in section 457.7, release that person in accordance with paragraphs 453(1)(f) to (h).

(2) Where a person has been arrested without warrant for an indictable offence alleged to have been committed in Canada outside the province in which he was arrested, he shall, within the time prescribed in paragraphs (1)(a) and (b), be taken before a justice within whose jurisdiction he was arrested and the justice,

- (a) if he is not satisfied that there are reasonable and probable grounds to believe that the person arrested is the person alleged to have committed the offence, shall release him; or
- (b) if he is satisfied that there are reasonable and probable grounds to believe that the person arrested is the person alleged to have committed the offence, may remand him to the custody of a peace officer to await execution of a warrant for his arrest in accordance with section 461, but if no warrant for his arrest is so exe-

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cutted within a period of six days after the time he is remanded to such custody, the person in whose custody he then is shall release him.

(2.1) Notwithstanding paragraph (2)(b), a justice may, with the consent of the prosecutor, order that the person referred to in subsection (2), pending the execution of a warrant for his arrest, be released

- (a) unconditionally, or
- (b) on any of the following terms to which the prosecutor consents, namely
 - (i) giving an undertaking, or
 - (ii) entering into a recognizance described in any of paragraphs 457(2)(a) to (d)

with such conditions described in subsection 457(4) as the justice considers desirable and to which the prosecutor consents. R.S.C. 1985, c. 19, s. 78.

(3) A peace officer or officer in charge having the custody of a person who has been arrested without warrant as a person about to commit an indictable offence shall release that person unconditionally as soon as practicable after he is satisfied that the continued detention of that person in custody is no longer necessary in order to prevent the commission by him of an indictable offence.

(4) Notwithstanding subsection (3), a peace officer or officer in charge having the custody of a person referred to in that subsection who does not release the person before the expiration of the time prescribed in paragraph (1)(a) or (b) for taking the person before the justice, shall be deemed to be acting lawfully and in the execution of his duty for the purposes of

- (a) any proceedings under this or any other Act of Parliament, or
- (b) any other proceedings, unless in such proceedings it is alleged and established by the person making the allegation that the peace officer or officer in charge did not comply with the requirements of subsection (3). R.S., c. C-34, s. 454; R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 46.

Information, Summons and Warrant

In what cases justice may receive information.

455. Any one who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

- (a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
 - (i) is or is believed to be, or
 - (ii) resides or is believed to reside,

within the territorial jurisdiction of the justice;

- (b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

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- (c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or
- (d) that the person has in his possession stolen property within the territorial jurisdiction of the justice. R.S., c. C-34, s. 455; R.S., c. 2 (2nd Supp.), s. 5.

Time within which information to be laid in certain cases.

455.1. Where

- (a) an appearance notice has been issued to an accused under section 451, or
- (b) an accused has been released from custody under section 452 or 453,

an information relating to the offence alleged to have been committed by the accused or relating to an included or other offence alleged to have been committed by him shall be laid before a justice as soon as practicable thereafter and in any event before the time stated in the appearance notice, promise to appear or recognizance issued to or given or entered into by the accused for his attendance in court. R.S., c. 2 (2nd Supp.), s. 5.

Form

455.2. An information laid under section 455 or 455.1 may be in Form 2. R.S., c. 2 (2nd Supp.), s. 5.

Justice to hear informant and witnesses — Process compulsory — Procedure when witnesses attend — Summons to be issued except in certain cases — No process in blank — Endorsement of warrant by justice — Promise to appear or recognizance deemed to have been confirmed — Issue of summons or warrant.

455.3. (1) Subject to subsection 457.8(1.1), a justice who receives an information, other than an information laid before him under section 455.1, shall, except where an accused has already been arrested with or without a warrant,

- (a) hear and consider, *ex parte*
 - (i) the allegations of the informant, and
 - (ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and
- (b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence. R.S.C. 1985, c. 19, ss. 79(1) and (2).

(2) No justice shall refuse to issue a summons or warrant by reason only that the alleged offence is one for which a person may be arrested without warrant.

(3) A justice who hears the evidence of a witness pursuant to subsection (1) shall

- (a) take the evidence upon oath; and

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(b) cause the evidence to be taken in accordance with section 468 in so far as that section is capable of being applied.

(4) Where the justice considers that a case is made out for compelling the accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) disclose reasonable and probable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.

(5) A justice shall not sign a summons or warrant in blank.

(6) Where a justice issues a warrant under this section or section 455.4 or 456.1, he may, where the offence is

- (a) an indictable offence mentioned in section 483,
- (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction,
- (c) an offence punishable on summary conviction, or
- (d) any other offence that is punishable by imprisonment for five years or less,

authorize the release of the accused pursuant to section 453.1 by making an endorsement on the warrant in Form 25.1. R.S.C. 1985, c. 19, s. 79(3).

(7) Where, pursuant to subsection (6), a justice authorizes the release of an accused pursuant to section 453.1, a promise to appear given by the accused or a recognizance entered into by the accused pursuant to that section shall be deemed, for the purposes of subsection 133(5), to have been confirmed by a justice under section 455.4. R.S., c. 2 (2nd Supp.), s. 5; 1972, c. 13, s. 35(2).

(8) Where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered, a justice may issue either a summons or a warrant for the arrest of the accused in order to compel the accused to attend at the new or continued or renewed trial or hearing. R.S.C. 1985, c. 19, s. 79(4).

Justice to hear informant and witnesses — Procedure when witnesses attend.

455.4. (1) A justice who receives an information laid before him under section 455.1 shall

- (a) hear and consider, *ex parte*
 - (i) the allegations of the informant, and
 - (ii) the evidence of witnesses, where he considers it desirable or necessary to do so;
- (b) where he considers that a case for so doing is made out, whether the information relates to the offence alleged in the appearance notice, promise to appear or recognizance or to an included or other offence,
 - (i) confirm the appearance notice, promise to appear or recognizance, as the case may be, and endorse the information accordingly, or

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- (ii) cancel the appearance notice, promise to appear or recognizance, as the case may be, and issue, in accordance with section 455.3, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence and endorse on the summons or warrant that the appearance notice, promise to appear or recognizance, as the case may be, has been cancelled; and
 - (c) where he considers that a case is not made out for the purposes of paragraph (b), cancel the appearance notice, promise to appear or recognizance, as the case may be, and cause the accused to be notified forthwith of such cancellation. R.S.C. 1985, c. 19, s. 80.
- (2) A justice who hears the evidence of a witness pursuant to subsection (1) shall
- (a) take the evidence upon oath; and
 - (b) cause the evidence to be taken in accordance with section 468 in so far as that section is capable of being applied. R.S., c. 2 (2nd Supp.), s. 5.

Summons — Service on individual — Proof of service — Content of summons — Attendance for purposes of Identification of Criminals Act.

455.5. (1) A summons issued under this Part shall

- (a) be directed to the accused;
- (b) set out briefly the offence in respect of which the accused is charged; and
- (c) require the accused to attend court at a time and place to be stated therein and to attend thereafter as required by the court in order to be dealt with according to law. R.S.C. 1985, c. 19, s. 81.

(2) A summons shall be served by a peace officer who shall deliver it personally to the person to whom it is directed or, if that person cannot conveniently be found, shall leave it for him at his last or usual place of abode with some inmate thereof who appears to be at least sixteen years of age.

(3) Service of a summons may be proved by the oral evidence, given under oath, of the peace officer who served it or by his affidavit made before a justice or other person authorized to administer oaths or to take affidavits.

(4) A summons shall set out therein the text of subsection 133(4) and section 455.6.

(5) A summons may, where the accused is alleged to have committed an indictable offence, require the accused to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* and a person so appearing is deemed, for the purposes only of that Act, to be in lawful custody charged with an indictable offence. R.S., c. 2 (2nd Supp.), s. 5.

Failure to appear.

455.6. Where an accused who is required by a summons to appear at a time and place stated therein for the purposes of the *Identification of*

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Criminals Act does not appear at that time and place, a justice may issue a warrant for the arrest of the accused for the offence with which he is charged. R.S., c. 2 (2nd Supp.), s. 5.

Contents of warrant to arrest — No return day.

456. (1) A warrant issued under this Part shall

- (a) name or describe the accused,
- (b) set out briefly the offence in respect of which the accused is charged, and
- (c) order that the accused be forthwith arrested and brought before the judge or justice who issued the warrant or before some other judge or justice having jurisdiction in the same territorial division, to be dealt with according to law. R.S.C. 1985, c. 19, ss. 82(1) and (2).

(2) A warrant issued under this Part remains in force until it is executed, and need not be made returnable at any particular time. R.S.C. 1985, c. 19, s. 82(3).

Certain actions not to preclude issue of warrant — Warrant in default of appearance.

456.1. (1) A justice may, where he has reasonable and probable grounds to believe that it is necessary in the public interest to issue a summons or a warrant for the arrest of the accused, issue a summons or warrant notwithstanding that

- (a) an appearance notice or promise to appear or a recognizance entered into before an officer in charge has been confirmed or cancelled under subsection 455.4(1);
- (b) a summons has previously been issued under subsection 455.3(4); or
- (c) the accused has been released unconditionally or with the intention of compelling his appearance by way of summons. R.S.C. 1985, c. 19, s. 83.

(2) Where

- (a) service of a summons is proved and the accused fails to attend court in accordance with the summons,
- (b) an appearance notice or promise to appear or a recognizance entered into before an officer in charge has been confirmed under subsection 455.4(1) and the accused fails to attend court in accordance therewith in order to be dealt with according to law, or
- (c) it appears that a summons cannot be served because the accused is evading service,

a justice may issue a warrant for the arrest of the accused. R.S., c. 2 (2nd Supp.), s. 5.

Formalities of warrant.

456.2. A warrant in accordance with this Part shall be directed to the peace officers within the territorial jurisdiction of the justice, judge or court by whom or by which it is issued. R.S., c. 2 (2nd Supp.), s. 5.

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Execution of warrant — By whom warrant may be executed.

456.3. (1) A warrant in accordance with this Part may be executed by arresting the accused

(a) wherever he is found within the territorial jurisdiction of the justice, judge or court by whom or by which the warrant was issued; or

(b) wherever he is found in Canada, in the case of fresh pursuit.

(2) A warrant in accordance with this Part may be executed by a person who is one of the peace officers to whom it is directed, whether or not the place in which the warrant is to be executed is within the territory for which the person is a peace officer. R.S., c. 2 (2nd Supp.), s. 5.

Judicial Interim Release

Order of release — Release on undertaking with conditions, etc. — Power of justice to name sureties in order — Idem — Conditions authorized — Detention in custody — Order of detention — Order of release — Idem — Sufficiency of record — Justification for detention in custody — Detention in custody for offence mentioned in s. 427.

457. (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 427 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released upon his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice. R.S.C. 1985, c. 19, s. 84(1).

(2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released

- (a) upon his giving an undertaking with such conditions as the justice directs,
- (b) upon his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security,
- (c) upon his entering into a recognizance before the justice with sureties in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security,
- (c.1) with the consent of the prosecutor, upon his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and upon his depositing with the justice such sum of money or other valuable security as the justice directs, or
- (d) if the accused is not ordinarily resident in the province in which he is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, upon his entering into a recognizance before the justice with or without sureties

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in such amount and with such conditions, if any, as the justice directs, and upon his depositing with the justice such sum of money or other valuable security as the justice directs. R.S.C. 1985, c. 19, s. 186.

(2.1) Where, pursuant to subsection (2) or any other provision of this Act, a justice, judge or court orders that an accused be released upon his entering into a recognizance with sureties, the justice, judge or court may, in the order, name particular persons as sureties. R.S.C. 1985, c. 19, s. 84(2).

(3) The justice shall not make an order under any of paragraphs (2)(b) to (d) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made.

(4) The justice may direct as conditions under subsection (2) that the accused shall do any one or more of the following things as specified in the order, namely:

- (a) report at times to be stated in the order to a peace officer or other person designated in the order;
- (b) remain within a territorial jurisdiction specified in the order;
- (c) notify the peace officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;
- (d) abstain from communicating with any witness or other person expressly named in the order except in accordance with such conditions specified in the order as the justice deems necessary;
- (e) where the accused is the holder of a passport, deposit his passport as specified in the order; and
- (f) comply with such other reasonable conditions specified in the order as the justice considers desirable.

(5) Where the prosecutor shows cause why the detention of the accused in custody is justified, the justice shall order that the accused be detained in custody until he is dealt with according to law and shall include in the record a statement of his reasons for making the order.

(5.1) Notwithstanding any provision of this section, where an accused is charged

- (a) with an indictable offence, other than an offence listed in section 427, that is alleged to have been committed while he was at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 608 or 608.1.
- (b) with an indictable offence, other than an offence listed in section 427 and is not ordinarily resident in Canada,
- (c) with an offence under any of subsections 133(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 608, 608.1 or 752, or
- (d) with having committed an offence under section 4 or 5 of the *Narcotic Control Act* or the offence of conspiring to commit an offence under section 4 or 5 of the *Narcotic Control Act*

the justice shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, having been given a rea-

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sonable opportunity to do so, shows cause why his detention in custody is not justified, but where the justice orders that the accused be released, he shall include in the record a statement of his reasons for making the order. R.S.C. 1985, c. 19, s. 84(3).

(5.2) Where an accused to whom paragraph (5.1)(a), (c) or (d) applies shows cause why his detention in custody is not justified, the justice shall order that he be released upon his giving an undertaking or entering into a recognizance described in any of paragraphs 2(a) to (d) with such conditions described in subsection (4) or, where the accused was at large upon an undertaking or recognizance with conditions, such additional conditions described in subsection (4), as the justice considers desirable, unless the accused, having been given a reasonable opportunity to do so, shows cause why such conditions or additional conditions should not be imposed.

(5.3) Where an accused to whom paragraph (5.1)(b) applies shows cause why his detention in custody is not justified, the justice shall order that he be released upon his giving an undertaking or entering into a recognizance described in any of paragraphs (2)(a) to (d) with such conditions, described in subsection (4), as the justice considers desirable.

(6) For the purposes of subsections (5) and (5.1), it is sufficient if a record is made of the reasons in accordance with the provisions of Part XV relating to the taking of evidence at preliminary inquiries.

(7) For the purposes of this section, the detention of an accused in custody is justified only on either of the following grounds, namely:

- (a) on the primary ground that his detention is necessary to ensure his attendance in court in order to be dealt with according to law; and
- (b) on the secondary ground (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in paragraph (a)) that his detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or an interference with the administration of justice.

(8) Where an accused who is charged with an offence listed in section 427 is taken before a justice, the justice shall order that the accused be detained in custody until he is dealt with according to law and shall issue a warrant in Form 8 for the committal of the accused. R.S.C. 1985, c. 19, s. 84(4).

Remand in custody.

457.1. A justice may, before or at any time during the course of any proceedings under section 457, upon application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 14, but no such adjournment shall be for more than three clear days except with the consent of the accused. R.S., c. 2 (2nd Supp.), s. 5.

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Order directing matters not to be published for specified period — Failure to comply — “Newspaper”.

457.2. (1) Where the prosecutor or the accused intends to show cause under section 457, he shall so state to the justice and the justice may, and shall upon application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any newspaper or broadcast before such time as

- (a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged, or
- (b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended. R.S.C. 1985, c. 19, s. 101(2).

(2) Every one who fails without lawful excuse, the proof of which lies upon him, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.

(3) In this section, “newspaper” has the same meaning as it has in sections 262 to 281 by virtue of section 261. R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 48.

Inquiries to be made by justice and evidence — Release pending sentence.

457.3. (1) In any proceedings under section 457,

- (a) the justice may, subject to paragraph (b), make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable;
- (b) the accused shall not be examined or cross-examined by the justice or any other person as to the offence with which he is charged, and no inquiry shall be made of him as to that offence;
- (c) the prosecutor may, in addition to any other relevant evidence, lead evidence
 - (i) to prove that the accused has previously been convicted of a criminal offence,
 - (ii) to prove that the accused has been charged with and is awaiting trial for another criminal offence,
 - (iii) to prove that the accused has previously committed an offence under section 133, or
 - (iv) to show the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the accused;
- (d) the justice may take into consideration any relevant matters agreed upon by the prosecutor and the accused or his counsel; and
- (d.1) the justice may receive evidence obtained as a result of an interception of a private communication under and within the meaning of Part IV.1, in writing, orally or in the form of a recording and, for the purposes of this section, subsection 178.16(4) does not apply to such evidence; and

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(e) the justice may receive and base his decision upon evidence considered credible or trustworthy by him in the circumstances of each case. R.S.C. 1985, c. 19, s. 85(1).

(2) Where, before or at any time during the course of any proceedings under section 457, the accused pleads guilty and his plea is accepted, the justice may make any order provided for in this Part for the release of the accused until he is sentenced. R.S.C. 1985, c. 19, s. 85(2).

Release of accused — Discharge from custody — Warrant for committal.

457.4. (1) Where a justice makes an order under subsection 457(1), (2), (5.2) or (5.3),

(a) if the accused thereupon complies with the order, the justice shall direct that he be released

(i) forthwith, if the accused is not required to be detained in custody in respect of any other matter, or

(ii) as soon thereafter as the accused is no longer required to be detained in custody in respect of any other matter; and

(b) if the accused does not thereupon comply with the order, the justice who made the order or another justice having jurisdiction shall issue a warrant for the committal of the accused and may endorse thereon an authorization to the person having the custody of the accused to release the accused when the accused complies with the order

(i) forthwith after the compliance, if the accused is not required to be detained in custody in respect of any other matter, or

(ii) as soon thereafter as he is no longer required to be detained in custody in respect of any other matter

and if the justice so endorses the warrant, he shall attach to it a copy of the order.

(2) Where the accused complies with an order referred to in paragraph (1)(b) and he is not required to be detained in custody in respect of any other matter, the justice who made the order or another justice having jurisdiction shall, unless the accused has been or will be released pursuant to an authorization referred to in that paragraph, issue an order for discharge in Form 35. R.S.C. 1985, c. 19, s. 86.

Review of order of justice — Notice to prosecutor — Accused to be present — Adjournment of proceedings — Failure of accused to attend — Execution — Evidence and powers of judge on review — Limitation of further applications — Application of ss. 457.2, 457.3 and 457.4.

457.5. (1) Where a justice makes an order under subsection 457(2), (5), (5.1), (5.2) or (5.3) or makes or vacates any order under paragraph 457.8(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order made by the justice. R.S.C. 1985, c. 19, s. 87(1).

(2) An application under this section shall not, unless the prosecutor otherwise consents, be heard by a judge unless the accused has given to the prosecutor at least two clear days notice in writing of the application.

(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an appli-

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cation under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

(4) A judge may, before or at any time during the hearing of an application under this section, upon application by the prosecutor or the accused or his counsel, adjourn the proceedings, but if the accused is in custody no such adjournment shall be for more than three clear days except with the consent of the accused.

(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

(6) A warrant issued under subsection (5) may be executed anywhere in Canada.

(7) Upon the hearing of an application under this section, the judge may consider

- (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
- (b) the exhibits, if any, filed in the proceedings before the justice, and
- (c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

and shall either

- (d) dismiss the application, or
- (e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 457 that he considers warranted. R.S.C. 1985, c. 19, ss. 87(2) and (3).

(8) Where an application under this section or section 457.6 has been heard, a further or other application under this section or section 457.6 shall not be made with respect to that same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

(9) The provisions of sections 457.2, 457.3 and 457.4 apply *mutatis mutandis* in respect of an application under this section. R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 51.

Review of order of justice — Notice to accused — Accused to be present — Adjournment of proceedings — Failure of accused to attend — Warrant for detention — Execution — Evidence and powers of judge on review — Limitation of further applications — Application of ss. 457.2, 457.3 and 457.4.

457.6. (1) Where a justice makes an order under subsection 457(1), (2), (5.2) or (5.3) or makes or vacates any order under paragraph 457.8(2)(b), the prosecutor may, at any time before the trial of the charge, apply to a judge for a review of the order made by the justice. R.S.C. 1985, c. 19, s. 88(1).

(2) An application under this section shall not be heard by a judge unless the prosecutor has given to the accused at least two clear days notice in writing of the application.

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(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

(4) A judge may, before or at any time during the hearing of an application under this section, upon application of the prosecutor or the accused or his counsel, adjourn the proceedings, but if the accused is in custody no such adjournment shall be for more than three clear days except with the consent of the accused.

(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

(6) Where, pursuant to paragraph (8)(e), the judge makes an order that the accused be detained in custody until he is dealt with according to law, he shall, if the accused is not in custody, issue a warrant for the committal of the accused.

(7) A warrant issued under subsection (5) or (6) may be executed anywhere in Canada.

(8) Upon the hearing of an application under this section the judge may consider

- (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
- (b) the exhibits, if any, filed in the proceedings before the justice, and
- (c) such additional evidence or exhibits as may be tendered by the prosecutor or the accused,

and shall either

- (d) dismiss the application, or
- (e) if the prosecutor shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 457 that he considers to be warranted.

R.S.C. 1985, c. 19, s. 88(2).

(9) Where an application under this section or section 457.5 has been heard, a further or other application under this section or section 457.5 shall not be made with respect to the same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

(10) The provisions of sections 457.2, 457.3 and 457.4 apply *mutatis mutandis* in respect of an application under this section. R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 52.

Interim release by judge only — Order of judge — Release of accused — Order not reviewable except under s. 608.1 — Application of ss. 457.2, 457.3 and 457.4 — Other offences.

457.7. (1) Where an accused is charged with an offence listed in section 427, no court, judge or justice, other than a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in

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which the accused is so charged, may release the accused before or after he has been ordered to stand trial.

(2) Where an accused is charged with an offence listed in section 427, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 457(7).

(2.1) Where the judge does not order that the accused be detained in custody pursuant to subsection (2), he may order that the accused be released on his giving an undertaking or entering into a recognizance described in any of paragraphs 457(2)(a) to (d) with such conditions described in subsection 457(4) as the judge considers desirable. R.S.C. 1985, c. 19, s. 89(1).

(2.2) An order made under this section is not subject to review, except as provided in section 608.1.

(3) The provisions of sections 457.2, 457.3 except subsection (2) thereof, and 457.4 apply *mutatis mutandis* in respect of an application for an order under subsection (2). R.S., c. 2 (2nd Supp.), s. 5; 1972, c. 13, s. 36(2); 1974-75-76, c. 93, s. 53.

(4) Where an accused is charged with an offence listed in section 427 and with any other offence, a judge acting under this section may apply the provisions of this Part respecting judicial interim release to that other offence. R.S.C. 1985, c. 19, s. 89(2).

Period for which appearance notice, etc., continues in force — Where new information charging same offence — Order vacating previous order for release or detention — Provisions applicable to proceedings under subsection (2).

457.8. (1) Where an accused, in respect of an offence with which he is charged, has not been taken into custody or has been released from custody under or by virtue of any provision of this Part, the appearance notice, promise to appear, summons, undertaking or recognizance issued to, given or entered into by him continues in force, subject to its terms, and applies in respect of any new information charging the same offence or an included offence that was received after the appearance notice, promise to appear, summons, undertaking or recognizance was issued, given or entered into,

- (a) where the accused was released from custody pursuant to an order of a judge made under subsection 457.7(2), until his trial is completed, or
- (b) in any other case,
 - (i) until his trial is completed, and
 - (ii) where the accused is, at his trial, determined to be guilty of the offence, until a sentence within the meaning of section 601 is imposed on the accused unless, at the time he is determined to be guilty, the court, judge or justice orders that the accused be taken into custody pending such sentence. R.S.C. 1985, c. 19, ss. 90(1) and (2).

(1.1) Where an accused, in respect of an offence with which he is charged, has not been taken into custody or is being detained or has been

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released from custody under or by virtue of any provision of this Part and after the order for interim release or detention has been made, or the appearance notice, promise to appear, summons, undertaking or recognizance has been issued, given or entered into, a new information, charging the same offence or an included offence, is received, section 455.3 or 455.4, as the case may be, does not apply in respect of the new information and the order for interim release or detention of the accused and the appearance notice, promise to appear, summons, undertaking or recognizance, if any, applies in respect of the new information. R.S.C. 1985, c. 19, s. 90(3).

(2) Notwithstanding subsections (1) and (1.1),

- (a) the court, judge or justice before whom an accused is being tried, at any time,
- (b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 427, or
- (c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1), without such consent, at any time
 - (i) where the accused is charged with an offence other than an offence listed in section 427, the justice by whom an order was made under this Part or any other justice,
 - (ii) where the accused is charged with an offence listed in section 427, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province, or
 - (iii) the court, judge or justice before whom an accused is to be tried,

may, on cause being shown, vacate any order previously made under this Part for the interim release or detention of the accused and make any other order provided for in this Part for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.

(3) The provisions of sections 457.2, 457.3 and 457.4 apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2), except that subsection 457.3(2) does not apply in respect of an accused who is charged with an offence listed in section 427. R.S.C. 1985, c. 19, s. 90(4).

Arrest of Accused on Interim Release

Issue of warrant for arrest of accused — Arrest of accused without warrant — Hearing — Retention of accused — Release of accused — Order not reviewable — Release of accused — Powers of justice after hearing — Release of accused — Reasons — Where justice to order that accused be released — Provisions applicable to proceedings under this section — Certain provisions applicable to order under this section.

458. (1) Where a justice is satisfied that there are reasonable and probable grounds to believe that an accused

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- (a) has violated or is about to violate any summons, appearance notice, promise to appear, undertaking or recognizance that was issued or given to him or entered into by him, or
- (b) has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,

he may issue a warrant for the arrest of the accused.

(2) Notwithstanding anything in this Act, a peace officer who has reasonable and probable grounds to believe that an accused

- (a) has violated or is about to violate any summons, appearance notice, promise to appear, undertaking or recognizance that was issued or given to him or entered into by him, or
- (b) has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,

may arrest the accused without warrant.

(3) Where an accused who has been arrested with a warrant issued under subsection (1), or who has been arrested under subsection (2), is taken before a justice, the justice shall

- (a) where the accused was released from custody pursuant to an order made under subsection 457.7(2) by a judge of the superior court of criminal jurisdiction of any province, order that the accused be taken before a judge of that court, or
- (b) in any other case, hear the prosecutor and his witnesses, if any, and the accused and his witnesses, if any.

(4) Where an accused described in paragraph (3)(a) is taken before a judge and the judge finds

- (a) that the accused has violated or had been about to violate his summons, appearance notice, promise to appear, undertaking or recognizance, or
- (b) that there are reasonable and probable grounds to believe that the accused has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,

he shall cancel the summons, appearance notice, promise to appear, undertaking or recognizance and order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 457(7).

(4.1) Where the judge does not order that the accused be detained in custody pursuant to subsection (4), he may order that the accused be released upon his giving an undertaking or entering into a recognizance described in any of paragraphs 457(2)(a) to (d) with such conditions described in subsection 457(4) or, where the accused was at large upon an undertaking or a recognizance with conditions, such additional conditions, described in subsection 457(4), as the judge considers desirable.

(4.2) Any order made under subsection (4) or (4.1) is not subject to review, except as provided in section 608.1.

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(4.3) Where the judge does not make a finding under paragraph (4)(a) or (b), he shall order that the accused be released from custody.

(5) Where an accused described in subsection (3), other than an accused to whom paragraph (a) of that subsection applies, is taken before the justice and the justice finds

- (a) that the accused has violated or had been about to violate his summons, appearance notice, promise to appear, undertaking or recognizance, or
- (b) that there are reasonable and probable grounds to believe that the accused has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,

he shall cancel the summons, appearance notice, promise to appear, undertaking or recognizance and order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 457(7).

(5.1) Where the accused shows cause why his detention in custody is not justified within the meaning of subsection 457(7), the justice shall order that the accused be released upon his giving an undertaking or entering into a recognizance described in any of paragraphs 457(2)(a) to (d) with such conditions, described in subsection 457(4), as the justice considers desirable.

(6) Where the justice makes an order under subsection (5.1), he shall include in the record a statement of his reasons for making the order, and subsection 457(6) is applicable *mutatis mutandis* in respect thereof.

(7) Where the justice does not make a finding under paragraph (5)(a) or (b), he shall order that the accused be released from custody.

(8) The provisions of section 457.2, 457.3 and 457.4 apply *mutatis mutandis* in respect of any proceedings under this section, except that subsection 457.3(2) does not apply in respect of an accused who is charged with an offence mentioned in section 457.7.

(9) Section 457.5 applies in respect of any order made under subsection (5) or (5.1) as though the order were an order made by a justice under subsection 457(2) or (5), and section 457.6 applies in respect of any order made under subsection (5.1) as though the order were an order made by a justice under subsection 457(2). R.S., c. C-34, s. 458; R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 55.

Review of Detention where Trial Delayed

Time for application to judge — Notice of hearing — Matters to be considered on hearing — Order — Warrant of judge for arrest — Arrest without warrant by peace officer — Hearing and order — Provisions applicable to proceedings — Directions for expediting trial.

459. (1) Where an accused who has been charged with an offence other than an offence listed in section 427 and who is not required to be detained in custody in respect of any other matter is being detained in custody pending his trial for that offence and the trial has not commenced

- (a) in the case of an indictable offence, within ninety days from

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- (i) the day on which the accused was taken before a justice under section 454, or
- (ii) where an order that the accused be detained in custody has been made under section 457.6 or 458, the day on which he was taken into custody under that order, or
- (b) in the case of an offence for which the accused is being prosecuted in proceedings by way of summary conviction, within thirty days from
 - (i) the day on which the accused was taken before a justice under subsection 454(1), or
 - (ii) where an order that the accused be detained in custody has been made under section 457.6 or 458, the day on which he was taken into custody under that order,

the person having the custody of the accused shall, forthwith upon the expiration of those ninety or thirty days, as the case may be, apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody. R.S.C. 1985, c. 19, s. 91(1).

(2) On receiving an application under subsection (1), the judge shall

- (a) fix a date for the hearing described in subsection (1) to be held in the jurisdiction
 - (i) where the accused is in custody, or
 - (ii) where the trial is to take place; and
- (b) direct that notice of the hearing be given to such persons, including the prosecutor and the accused, and in such manner, as the judge may specify. R.S.C. 1985, c. 19, s. 91(2).

(3) Upon the hearing described in subsection (1), the judge may, in deciding whether or not the accused should be released from custody, take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge.

(4) If, following the hearing described in subsection (1), the judge is not satisfied that the continued detention of the accused in custody is justified within the meaning of subsection 457(7), he shall order that the accused be released from custody pending the trial of the charge on his giving an undertaking or entering into a recognizance described in any of paragraphs 457(2)(a) to (d) with such conditions described in subsection 457(4) as the judge considers desirable. R.S.C. 1985, c. 19, s. 91(3).

(5) Where a judge having jurisdiction in the province where an order under subsection (4) for the release of an accused has been made is satisfied that there are reasonable and probable grounds to believe that the accused

- (a) has violated or is about to violate the undertaking or recognizance upon which he has been released, or
- (b) has, after his release from custody upon his undertaking or recognizance, committed an indictable offence,

he may issue a warrant for the arrest of the accused.

(6) Notwithstanding anything in this Act, a peace officer who has reasonable and probable grounds to believe that an accused who has been released from custody under subsection (4)

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- (a) has violated or is about to violate the undertaking or recognizance upon which he has been released, or
- (b) has, after his release from custody upon his undertaking or recognizance, committed an indictable offence,

may arrest the accused without warrant and take him or cause him to be taken before a judge having jurisdiction in the province where the order for his release was made.

(7) A judge before whom an accused is taken pursuant to a warrant issued under subsection (5) or pursuant to subsection (6) may, where the accused shows cause why his detention in custody is not justified within the meaning of subsection 457(7), order that the accused be released upon his giving an undertaking or entering into a recognizance described in any of paragraphs 457(2)(a) to (d) with such conditions, described in subsection 457(4), as the judge considers desirable.

(8) The provisions of sections 457.2, 457.3 and 457.4 apply *mutatis mutandis* in respect of any proceedings under this section.

(9) Where an accused is before a judge under any of the provisions of this section, the judge shall give directions for expediting the trial of the accused. R.S.C. 1985, c. 19, s. 91(4).

Directions for expediting proceedings

459.1. Subject to subsection 459(9), a court, judge or justice before whom an accused appears pursuant to this Part may give directions for expediting any proceedings in respect of the accused. R.S.C. 1985, c. 19, s. 92.

Procedure to Procure Attendance of a Prisoner

Procuring attendance — Magistrate's order — Conveyance of prisoner — Detention of prisoner required as witness — Detention in other cases — Application of sections respecting sentence — Transfer of prisoner — Conveyance of prisoner — Return.

460. (1) Where a person who is confined in a prison is required
- (a) to attend at a preliminary inquiry into a charge against him,
 - (b) to stand his trial upon a charge that may be tried by indictment or on summary conviction, or
 - (c) to attend to give evidence in a proceeding to which this Act applies,

a judge of a superior court of criminal jurisdiction or of a county or district court may order in writing that the prisoner be brought before the court, judge, justice, or magistrate before whom his attendance is required, from day to day as may be necessary, if

- (d) the applicant for the order sets out the facts of the case in an affidavit and produces the warrant, if any, and
- (e) the judge is satisfied that the ends of justice require that an order be made.

(2) A magistrate has the same powers for the purposes of subsection (1) as a judge has under that subsection where the person whose attendance is required is confined in a prison within the province in which the magistrate has jurisdiction.

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(3) An order that is made under subsection (1) or (2) shall be addressed to the person who has custody of the prisoner, and on receipt thereof that person shall

(a) deliver the prisoner to any person who is named in the order to receive him, or

(b) bring the prisoner before the court, judge, justice or magistrate, as the case may be, upon payment of his reasonable charges in respect thereof.

(4) Where the prisoner is required as a witness, the judge or magistrate shall direct, in the order, the manner in which the prisoner shall be kept in custody and returned to the prison from which he is brought.

(5) Where the appearance of the prisoner is required for the purposes of paragraph (1)(a) or (b), the judge or magistrate shall give appropriate directions in the order with respect to the manner in which the prisoner is

(a) to be kept in custody, if he is ordered to stand trial; or

(b) to be returned, if he is discharged upon a preliminary inquiry or if he is acquitted of the charge against him. R.S.C. 1985, c. 19, s. 101(2).

(6) Sections 645 and 659 apply where a prisoner to whom this section applies is convicted and sentenced to imprisonment by the court, judge, justice or magistrate. 1953-54, c. 51, s. 446.

(7) On application by the prosecutor, a judge of a superior court of criminal jurisdiction or of a county or district court may, if the prisoner consents in writing, order the transfer of a prisoner to the custody of a peace officer named in the order for a period specified in the order where the judge is satisfied that such transfer is required for the purpose of assisting a peace officer acting in the execution of his duties.

(8) An order under section (7) shall be addressed to the person who has custody of the prisoner and on receipt thereof that person shall deliver the prisoner to the peace officer who is named in the order to receive him.

(9) When the purposes of any order made under this section have been carried out, the prisoner shall be returned to the place where he was confined at the time the order was made. R.S.C. 1985, c. 19, s. 93.

Endorsement of Warrant

Endorsing warrant — Effect of endorsement.

461. (1) Where a warrant for the arrest or committal of an accused, in any form set out in Part XXV in relation thereto, cannot be executed in accordance with section 456.3 or 631, a justice within whose jurisdiction the accused is or is believed to be shall, on application and proof on oath or by affidavit of the signature of the justice who issued the warrant, authorize the arrest of the accused within his jurisdiction by making an endorsement, which may be in Form 25, on the warrant. R.S.C. 1985, c. 19, s. 94.

(2) An endorsement that is made upon a warrant pursuant to subsection (1) is sufficient authority to the peace officers to whom it was originally directed, and to all peace officers within the territorial jurisdiction of the justice by whom it is endorsed, to execute the warrant and to take the accused before the justice who issued the warrant or before some

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other justice for the same territorial division. R.S., c. C-34, s. 461; 1974-75-76, c. 93, s. 57.

Coroner's Warrant

Coroner's warrant and recognizance — Transmitting depositions.

462. (1) Where a person is alleged, by a verdict upon a coroner's inquisition, to have committed murder or manslaughter but he has not been charged with the offence, the coroner shall

- (a) direct, by warrant under his hand, that the person be taken into custody and be conveyed, as soon as possible, before a justice, or
- (b) direct the person to enter into a recognizance before him with or without sureties, to appear before a justice.

(2) Where a coroner makes a direction under subsection (1) he shall transmit to the justice the evidence taken before him in the matter. 1953-54, c. 51, s. 448.

SECTIONS REFERRED TO IN PART XIV

ss. 133(1) to (6)

133. (1) Every one who

- (a) escapes from lawful custody, or
- (b) is, before the expiration of a term of imprisonment to which he was sentenced, at large in or out of Canada without lawful excuse, the proof of which lies upon him,

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.

(2) Every one who,

- (a) being at large on his undertaking or recognizance given to or entered into before a justice or judge, fails, without lawful excuse, the proof of which lies upon him, to attend court in accordance with the undertaking or recognizance, or
- (b) having appeared before a court, justice or judge, fails, without lawful excuse, the proof of which lies upon him, to attend court as thereafter required by the court, justice or judge.

or to surrender himself in accordance with an order of the court, justice or judge, as the case may be, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.

(3) Every one who, being at large on his undertaking or recognizance given to or entered into before a justice or a judge and being bound to comply with a condition of that undertaking or recognizance directed by a justice or a judge, fails, without lawful excuse, the proof of which lies upon him, to comply with that condition, is guilty of

- (a) an indictable offence and is liable to imprisonment for two years, or
- (b) an offence punishable on summary conviction.

(4) Every one who is served with a summons and who fails, without lawful excuse, the proof of which lies upon him, to appear at a time and

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place stated therein, if any, for the purposes of the *Identification of Criminals Act* or to attend court in accordance therewith, is guilty of

(a) in indictable offence and is liable to imprisonment for two years,
or

(b) an offence punishable on summary conviction.

(5) Every one who is named in an appearance notice or promise to appear, or in a recognizance entered into before an officer in charge, that has been confirmed by a justice under section 455.4 and who fails, without lawful excuse, the proof of which lies upon him, to appear at a time and place stated therein, if any, for the purposes of the *Identification of Criminals Act*, or to attend court in accordance therewith, is guilty of

(a) an indictable offence and is liable to imprisonment for two years,
or

(b) an offence punishable on summary conviction.

(6) For the purpose of subsection (5), it is not a lawful excuse that an appearance notice, promise to appear or recognizance states defectively the substance of the alleged offence.

s. 427

427. Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than

(a) an offence under any of the following sections, namely,

(i) section 47 (treason),

(ii) section 49 (alarming Her Majesty),

(iii) section 51 (intimidating Parliament or a legislature),

(iv) section 53 (inciting to mutiny),

(v) section 62 (seditious offences),

(vi) section 75 (piracy),

(vii) section 76 (piratical acts), or

(viii) section 218 (murder)

(ix) [Repealed 1974-75-76, c. 93, s. 37]

(x) to (xv) [Repealed 1972, c. 13, s. 33]

(b) the offence of being an accessory after the fact to high treason or treason or murder,

(c) an offence under section 108 (bribery) by the holder of a judicial office,

(d) the offence of attempting to commit any offence mentioned in subparagraphs (a)(i) to (vii), or

(e) the offence of conspiring to commit any offence mentioned in paragraph (a). 1972, c. 13, s. 33; 1974-75-76 c. 93, s. 37, c. 105, s. 29; 1985, c. 19, s. 63.

s. 468

468. (1) Where the accused is before a justice holding a preliminary inquiry, the justice shall

(a) take the evidence under oath, in the presence of the accused, of the witnesses called on the part of the prosecution and allow the accused or his counsel to cross-examine them; and

(b) cause a record of the evidence of each witness to be taken

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- (i) in legible writing in the form of a deposition, in Form 27, or by a stenographer appointed by him or pursuant to law, or
 - (ii) in a province where a sound recording apparatus is authorized by or under provincial legislation for use in civil cases, by the type of apparatus so authorized and in accordance with the requirements of the provincial legislation.
- (2) Where a deposition is taken down in writing, the justice shall, in the presence of the accused, before asking the accused if he wishes to call witnesses,
- (a) cause the deposition to be read to the witness,
 - (b) cause the deposition to be signed by the witness, and
 - (c) sign the deposition himself.
- (3) Where depositions are taken down in writing the justice may sign
- (a) at the end of each deposition, or
 - (b) at the end of several or of all the depositions in a manner that will indicate that his signature is intended to authenticate each disposition.
- (4) Where the stenographer appointed to take down the evidence is not a duly sworn court stenographer he shall make oath that he will truly and faithfully report the evidence.
- (5) Where the evidence is taken down by a stenographer appointed by the justice or pursuant to law, it need not be read to or signed by the witnesses, but shall be transcribed by the stenographer and the transcript shall be accompanied by
- (a) an affidavit of the stenographer that it is a true report of the evidence, or
 - (b) a certificate that it is a true report of the evidence if the stenographer is a duly sworn court stenographer.
- (6) Where, in accordance with this Act, a record is taken in any proceedings under this Act by a sound recording apparatus, the record so taken shall be dealt with and transcribed and the transcription certified and used in accordance with the provincial legislation *mutatis mutandis* mentioned in subsection (1). 1985, c. 19, s. 98.

s. 608

608. (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,

- (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 607,
 - (b) in the case of an appeal to the court of appeal against sentence only the appellant has been granted leave to appeal, or
 - (c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.
- (2) Where an appellant applies to a judge of the court of appeal to be released pending the determination of his appeal, he shall give written

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notice of the application to the prosecutor or to such other person as a judge of the court of appeal directs.

(3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

- (a) the appeal or application for leave to appeal is not frivolous,
- (b) he will surrender himself into custody in accordance with the terms of the order, and
- (c) his detention is not necessary in the public interest.

(4) In the case of an appeal referred to in paragraph (1)(b), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that

- (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody,
- (b) he will surrender himself into custody in accordance with the terms of the order, and
- (c) his detention is not necessary in the public interest.

(5) Where the judge of the court of appeal does not refuse the application of the appellant, he shall order that the appellant be released

- (a) upon his giving an undertaking to the judge, without conditions or with such conditions as the judge directs, to surrender himself into custody in accordance with the order,
- (b) upon his entering into a recognizance
 - (i) with one or more sureties,
 - (ii) with deposit of money or other valuable security,
 - (iii) with both sureties and deposit, or
 - (iv) with neither sureties nor deposit,
in such amount, subject to such conditions, if any, and before such justice as the judge directs,
- (c) [Repealed 1985, c. 19, s. 139.]

and the person having the custody of the appellant shall, where the appellant complies with the order, forthwith release the appellant.

(6) The provisions of subsections 459(5), (6) and (7) apply *mutatis mutandis* in respect of a person who has been released from custody under subsection (5) of this section.

(7) Where, with respect to any person, the court of appeal or the Supreme Court of Canada orders a new trial or new hearing or the Minister of Justice gives a direction or makes a reference under section 617, this section applies to the release or detention of that person pending the new trial or new hearing or the hearing and determination of the reference, as the case may be, as though that person were an appellant in an appeal described in paragraph (1)(a).

(8) This section applies to applications for leave to appeal and appeals to the Supreme Court of Canada in summary conviction proceedings.

(9) An undertaking under this section may be in Form 9 and a recognizance under this section may be in Form 28.

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(10) A judge of the court of appeal, where upon the application of an appellant he does not make an order under subsection (5) or where he cancels an order previously made under this section, or a judge of the Supreme Court of Canada upon application by an appellant in the case of an appeal to that Court, may give such directions as he thinks necessary for expediting the hearing of the appellant's appeal or for expediting the new trial or new hearing or the hearing of the reference, as the case may be. R.S., c. 2 (2nd Supp.), s. 12; 1985, c. 19, s. 139.

608.1. (1) A decision made by a judge under section 457.7 or subsection 458(4) or (4.1) or a decision made by a judge of the court of appeal under section 608 may, upon the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or

(b) substitute such other decision as, in its opinion, should have been made.

(2) On consent of the parties, the powers of the court of appeal under subsection (1) may be exercised by a judge of that court.

(3) A decision as varied or substituted under this section shall have effect and may be enforced in all respects as though it were the decision originally made. R.S., c. 2 (2nd Supp.), s. 12, 1974-75-76, c. 93, s. 73; 1985, c. 19, s. 140.

631. (1) Notwithstanding any other province of this Act, a warrant of arrest or committal that is issued out of a superior court of criminal jurisdiction, a court of appeal, an appeal court within the meaning of section 747 or a court of criminal jurisdiction other than a provincial court judge acting under Part XVI may be executed anywhere in Canada.

(2) Notwithstanding any other provision of this Act but subject to subsection 633(3), a warrant of arrest or committal that is issued by a justice or provincial court judge may be executed anywhere in the provision in which it is issued. 1985, c. 19, s. 148.

752. (1) A person who was the defendant in proceedings before a summary conviction court and by whom an appeal is taken under section 748 shall, if he is in custody, remain in custody unless the appeal court at which the appeal is to be heard orders that the appellant be released

(a) upon his giving an undertaking to the appeal court, without conditions or with such conditions as the appeal court directs, to surrender himself into custody in accordance with the order,

(b) upon his entering into a recognizance without sureties in such amount, with such conditions, if any, as the appeal court directs, but without deposit of money or other valuable security, or

(c) upon his entering into a recognizance with or without sureties in such amount, with such conditions, if any, as the appeal court directs, and upon his depositing with that appeal court such sum of money or other valuable security as the appeal court directs.

and the person having the custody of the appellant shall, where the appellant complies with the order, forthwith release the appellant.

(2) The provisions of subsections 459(5), (6) and (7) apply *mutatis mutandis* in respect of a person who has been released from custody

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under subsection (1). R.S., c. 2 (2nd Supp.), s. 16; 1974-75-76, c. 93, ss. 91, 102; 1985, c. 19, s. 181.

CHAPTER 124

Dog Owners' Liability Act

1. In this Act, "owner", when used in relation to a dog, includes a person who possesses or harbours the dog and, where the owner is a minor, the person responsible for the custody of the minor. 1980, c. 65, s. 1.

Interpretation

2.—(1) The owner of a dog is liable for damages resulting from a bite or attack by the dog on another person.

Liability of owner

(2) Where there is more than one owner of a dog, they are jointly and severally liable under this section.

Where more than one owner

(3) The liability of the owner does not depend upon *scienter* or fault or negligence on the part of the owner, but the court shall reduce the damages awarded in proportion to the degree, if any, to which the fault or negligence of the plaintiff caused or contributed to the damages.

Extent of liability

(4) An owner who is liable to pay damages under this section is entitled to recover contribution and indemnity from any other person in proportion to the degree to which the other person's fault or negligence caused or contributed to the damages. 1980, c. 65, s. 2.

Contribution by person at fault

3.—(1) Where damage is caused by being bitten or attacked by a dog on the premises of the owner, the liability of the owner is determined under this Act and not under the *Occupiers' Liability Act*.

Application of R.S.O. 1980, c. 322

(2) Where a person is on premises with the intention of committing, or in the commission of, a criminal act on the premises and incurs damage caused by being bitten or attacked by a dog, the owner is not liable under section 2 unless the keeping of the dog on the premises was unreasonable for the purpose of the protection of persons or property. 1980, c. 65, s. 3.

Protection of property

4.—(1) Where it is alleged that a dog has bitten or attacked a person, a proceeding may be commenced against the owner of the dog and the proceeding is one to which Part VIII of the *Provincial Offences Act* applies.

Proceeding against owner of dog

R.S.O. 1980, c. 400

Chap. 124

DOG OWNERS' LIABILITY

Sec. 4 (2)

Order

(2) Where, in a proceeding under subsection (1), the provincial offences court finds that the dog has bitten or attacked a person, and the court is satisfied that an order is necessary for the protection of the public, the court may order,

- (a) that the dog be destroyed in such manner as is provided in the order; or
- (b) that the owner of the dog take such steps as are provided in the order for the more effective control of the dog.

Considerations

(3) In exercising its powers to make an order under subsection (2), the court may take into consideration the following circumstances:

- 1. The past and present temperament and behaviour of the dog.
- 2. The seriousness of the injuries caused by the biting or attack.
- 3. Unusual contributing circumstances tending to justify the action of the dog.
- 4. The improbability that a similar attack will be repeated.
- 5. The dog's physical potential for inflicting harm.
- 6. Precautions taken by the owner to preclude similar attacks in the future.
- 7. Any other circumstances that the court considers to be relevant.

Penalty

(4) An owner who contravenes an order made under subsection (2) is guilty of an offence and on conviction is liable to a fine not exceeding \$2,000. 1980, c. 65, s. 4.

CANADA EVIDENCE ACT

CANADA EVIDENCE ACT

R.S.C. 1970, c. E-10

An Act Respecting Witnesses and Evidence

SHORT TITLE

Short title.

1. This Act may be cited as the *Canada Evidence Act*.

PART I

APPLICATION

Application.

2. This Part applies to all criminal proceedings, and to all civil proceedings and other matters whatever respecting which the Parliament of Canada has jurisdiction in this behalf.

WITNESSES

Interest or crime.

3. A person is not incompetent to give evidence by reason of interest or crime.

Accused and spouse — Idem — Communications during marriage — Offences against young persons — Saving — Failure to testify.

4. (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence whether the person so charged is charged solely or jointly with any other person.

(2) The wife or husband of a person charged with an offence against section 50(1) of the *Young Offenders Act* or with an offence against any of sections 146, 150 to 155, 157, 166 to 169, 175, 195, 197, 200, 246.1, 246.2, 246.3, 249 to 250.2, 255 to 258 or 289 of the *Criminal Code*, or an attempt to commit any such offence, is a competent and compellable witness for the prosecution without the consent of the person charged. 1983-84, c. 40, s. 27(1)

- (3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

(3.1) The wife or husband of a person charged with an offence against any of sections 203, 204, 218, 219, 220, 222, 223, 245, 245.1, 245.2 or 245.3 of the *Criminal Code* where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged.

(4) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

(5) The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution. 1980-81-82, c. 125, s. 29.

Incriminating questions — Answer not receivable against witness.

5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

Evidence of mute.

6. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible.

Expert witnesses.

7. Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the court or judge or person presiding.

Handwriting comparison.

8. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting such writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.

CANADA EVIDENCE ACT

Adverse witnesses — Previous statements in writing by witness not proved adverse.

9. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, or reduced to writing, inconsistent with his present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider such cross-examination in determining whether in the opinion of the court the witness is adverse.

Cross-examination as to previous statements in writing — Depositions of witness in criminal investigation.

10. (1) Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; but if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing that are to be used for the purpose of so contradicting him; the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit.

(2) A deposition of the witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *prima facie* to have been signed by the witness.

Cross-examination as to previous oral statements.

11. Where a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

Examination as to previous conviction — How conviction proved.

12. (1) A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

(2) The conviction may be proved by producing.

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if for an offence punishable upon summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if upon indictment was had or to which the conviction, if summary, was returned; and

(b) proof of identity.

OATHS AND AFFIRMATIONS

Who may administer oaths.

13. Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person.

Affirmation by witness instead of oath — Effect.

14. (1) Where a person called or desiring to give evidence objects, on grounds of conscientious scruples, to take an oath, or is objected to as incompetent to take an oath, such person may make the following affirmation:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.

(2) Upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath.

Affirmation by deponent — Effect.

15. (1) Where a person requiring or desiring to make an affidavit or deposition in a proceeding or on an occasion whereon or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit such person, instead of being sworn, to make his solemn affirmation in the words following, namely: "I, A.B., do solemnly affirm, etc."; and this solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form.

(2) Any witness whose evidence is admitted or who makes an affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn.

Evidence of child — Must be corroborated.

16. (1) In any legal proceedings where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge,

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justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

JUDICIAL NOTICE

Imperial Acts, etc.

17. Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony which, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the *British North America Act, 1867*.

Acts of Canada.

18. Judicial notice shall be taken of all Acts of the Parliament of Canada, public or private, without being specially pleaded.

DOCUMENTARY EVIDENCE

Copies by Queen's Printer.

19. Every copy of any Act of the Parliament of Canada, public or private, printed by the Queen's Printer, is evidence of such Act and of its contents; and every copy purporting to be printed by the Queen's Printer shall be deemed to be so printed, unless the contrary is shown.

Imperial proclamations, etc.

20. Imperial proclamations, orders in council, treaties, orders, warrants, licences, certificates, rules, regulations, or other Imperial official records, Acts or documents may be proved

(a) in the same manner as they may from time to time be provable in any court in England;

(b) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of the same or a notice thereof; or

(c) by the production of a copy thereof purporting to be printed by the Queen's Printer.

Proclamations, etc., of Governor General.

21. Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada and evidence of a treaty to which Canada is a party, may be given in all or any of the modes following, that is to say:

(a) by the production of a copy of the *Canada Gazette*, or a volume of the

Acts of the Parliament of Canada purporting to contain a copy of such treaty, proclamation, order, regulation, or appointment or a notice thereof;

(b) by the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the Queen's Printer;

(b.1) by the production of a copy of such treaty purporting to be printed by the Queen's Printer or by Information Canada; and 1976-77 c. 28, s. 14.

(c) by the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk, or assistant or acting clerk of the Queen's Privy Council for Canada; and in the case of any order, regulation or appointment made or issued by or under the authority of any such minister or head of a department, by the production of a copy or extract purporting to be certified to be true by the minister, or by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.

Proclamations, etc., of Lieutenant Governor — In the case of the Territories.

22. (1) Evidence of any proclamation, order, regulation, or appointment made or issued by a lieutenant governor or lieutenant governor in council of any province, or by or under the authority of any member of the executive council, being the head of any department of the government of the province, may be given in all or any of the modes following, that is to say:

(a) by the production of a copy of the official gazette for the province, purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof;

(b) by the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the government or Queen's Printer for the province; and

(c) by the production of a copy or extract of such proclamation, order, regulation or appointment, purporting to be certified to be true by the clerk or assistant or acting clerk of the executive council, or by the head of any department of the government of a province, or by his deputy or acting deputy as the case may be.

(2) *Prima facie* evidence of any proclamation, order, regulation, or appointment made by the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as constituted previously to the 1st day of September 1905, or of the Commissioner in Council of the Northwest Territories or of the Commissioner in Council of the Yukon Territory, may also be given by the production of a copy of the *Canada Gazette* purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof.

Evidence of judicial proceedings, etc. — Certificate where court has no seal.

23. (1) Evidence of any proceeding or record whatever of, in, or before any court in Great Britain or the Supreme or Exchequer Courts of Canada, or

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any court in any province of Canada, or any court in any British colony or possession, or any court of record of the United States of America, or of any state of the United States of America, of any foreign country, or before any justice of the peace or coroner in any province of Canada, may be made in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of such court, or under the hand or seal of such justice or coroner, as the case may be, without any proof of the authenticity of such seal or of the signature of such justice or coroner, or other proof whatever.

(2) Where any such court, justice or coroner, has no seal, or so certifies, such evidence may be made by a copy purporting to be certified under the signature of a judge or presiding magistrate of such court or of such justice or coroner, without any proof of the authenticity of the signature, or other proof whatever.

Certified copies.

24. In every case in which the original record could be received in evidence,

(a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document is placed, or

(b) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or Act of Canada or of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof,

is receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof.

Books and documents.

25. Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other Act exists that renders its contents provable by means of a copy, a copy thereof or extract therefrom is admissible in evidence in any court of justice, or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, if it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

Books kept in offices under Government of Canada — Proof of non-issue of licence or document — Proof of mailing departmental matter — Proof of official character.

26. (1) A copy of any entry in any book kept in any office or department of the Government of Canada, or in any commission, board or other branch of the public service of Canada, shall be received as evidence of such entry, and

of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department, commission, board or other branch of the public service, that the book was, at the time of the making of the entry, one of the ordinary books kept in such office, department, commission, board or other branch of the public service, that the entry was made in the usual and ordinary course of business of such office, department, commission, board or other branch of the public service, and that such copy is a true copy thereof.

(2) Where by any Act of Canada or regulation thereunder provision is made for the issue by a department, commission, board or other branch of the public service, of a licence requisite to the doing or having of any act or thing or for the issue of any other document, an affidavit of an officer of the department, commission, board or other branch of the public service, sworn before any commissioner or other person authorized to take affidavits, that he has charge of the appropriate records and that after careful examination and search of such records he has been unable to find in any given case that any such licence or other document has been issued, shall be received in evidence as *prima facie* that in such case no licence or other document has been issued.

(3) Where by an Act of Canada or regulation thereunder provision is made for sending by mail any request for information, notice or demand by a department or other branch of the public service, an affidavit of an officer of the department or other branch of the public service sworn before any commissioner or other person authorized to take affidavits setting out that he has charge of the appropriate records, that he has a knowledge of the facts in the particular case, that such a request, notice or demand was sent by registered letter on a named date to the person or firm to whom it was addressed (including such address) and that he identifies as exhibits attached to such affidavit the post office certificate of registration of such letter and a true copy of such request, notice or demand, shall, upon production and proof of the post office receipt for the delivery of such registered letter to the addressee, be received in evidence as *prima facie* proof of such sending and of such request, notice or demand.

(4) Where proof is offered by affidavit pursuant to this section it is not necessary to prove the official character of the person making the affidavit if that information is set out in the body of the affidavit.

Notarial Acts in Quebec.

27. Any document purporting to be a copy of a notarial act or instrument made, filed or registered in the Province of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be received in evidence in the place and stead of the original, and has the same force and effect as the original would have if produced and proved; but it may be proved in rebuttal that there is no such original, or that the copy is not a true copy of the original in some mate-

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rial particular, or that the original is not an instrument of such nature as may, by the law of the Province of Quebec, be taken before a notary or be filed, enrolled or registered by a notary in the said Province.

Notice of production of book or document — Not less than 7 days.

28. (2) No copy of any book or other document shall be received in evidence, under the authority of section 23, 24, 25, 26 or 27, upon any trial, unless the party intending to produce the same has before the trial given to the party against whom it is intended to be produced reasonable notice of such intention.

(2) The reasonableness of the notice shall be determined by the court, judge or other person presiding, but the notice shall not in any case be less than seven days.

Copies of entries — Reception in evidence — Cheques, proof of “no account” — Proof of official character — Compulsion of production or appearance — Order to inspect and copy — Warrants to search — Definitions — Computation of time.

29. (1) Subject to this section, a copy of any entry in any book or record kept in any financial institution shall in all legal proceedings be received in evidence as *prima facie* proof of such entry and of the matters, transactions and accounts therein recorded.

(2) A copy of an entry in such book or record shall not be received in evidence under this section unless it is first proved that the book or record was, at the time of the making of the entry, one of the ordinary books or records of the financial institution, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the financial institution and that such copy is a true copy thereof; and such proof may be given by the manager or accountant of the financial institution and may be given orally or by affidavit sworn before any commissioner or other person authorized to take affidavits.

(3) Where a cheque has been drawn on any financial institution or branch thereof by any person, an affidavit of the manager or accountant of the financial institution or branch, sworn before any commissioner or other person authorized to take affidavits, setting out that he is the manager or accountant, that he has made a careful examination and search of the books and records for the purpose of ascertaining whether or not such person has an account with the financial institution or branch, and that he has been unable to find such an account, shall be received in evidence as *prima facie* proof that such person has no account in the financial institution or branch.

(4) Where evidence is offered by affidavit pursuant to this section it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

(5) A financial institution or officer of a financial institution is not in any le-

gal proceedings to which the financial institution is not a party compellable to produce any book or record, the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded unless by order of the court made for special cause.

(6) On the application of any party to a legal proceeding the court may order that such party be at liberty to inspect and take copies of any entries in the books or records of a financial institution for the purposes of the legal proceeding; and the person whose account is to be inspected shall be notified of the application at least two clear days before the hearing thereof, and if it is shown to the satisfaction of the court that he cannot be notified personally, the notice may be given by addressing it to the financial institution.

(7) Nothing in this section shall be construed as prohibiting any search of the premises of a financial institution under the authority of a warrant to search issued under any other Act of the Parliament of Canada, but unless the warrant is expressly endorsed by the person under whose hand it is issued as not being limited by this section, the authority conferred by any such warrant to search the premises of a financial institution and to seize and take away anything therein shall, as regards the books or records of such institution, be construed as limited to the searching of such premises for the purpose of inspecting and taking copies of entries in such books or records.

(8) In this section,

“court” means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

“financial institution” means the Bank of Canada, the Federal Business Development Bank and any institution incorporated in Canada that accepts deposits of money from its members or the public, and includes a branch, agency or office of any such Bank or institution;

“legal proceedings” means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration. 1974-75-76, c. 14, s. 57.

(9) Holidays shall be excluded from the computation of time under this section.

Business records to be received in evidence — Inference where information not in business record — Copy of records — Where record kept in form requiring explanation — Court may order other part of record to be produced — Court may examine record and hear evidence — Notice of intention to produce record or affidavit — Not necessary to prove signature and official character — Examination on record with leave of court — Evidence inadmissible under section — Construction of section — Definitions.

30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding upon production of the record.

(2) Where a record made in the usual and ordinary course of business does

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not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may upon production of the record admit the record for the purpose of establishing that fact and may draw the inference that such matter did not occur or exist.

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by an affidavit setting out the reasons why it is not possible or reasonably practicable to produce the record and an affidavit of the person who made the copy setting out the source from which the copy was made and attesting to its authenticity, each affidavit having been sworn before a commissioner or other person authorized to take affidavits, is admissible in evidence under this section in the same manner as if it were the original of such record.

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation, accompanied by an affidavit of that person setting forth his qualifications to make the explanation, attesting to the accuracy of the explanation and sworn before any commissioner or other person authorized to take affidavits, is admissible in evidence under this section in the same manner as if it were original of such record.

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of such other part thereof be produced by that party as the record produced by him.

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record received in evidence under this section, the court may, upon production of any record, examine the record, receive any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

(7) Unless the court orders otherwise, no record or affidavit shall be received in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by such party.

(8) Where evidence is offered by affidavit under this section it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

(9) Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(a) such part of any record as is proved to be

(i) a record made in the course of an investigation or inquiry,

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

(iii) a record in respect of the production of which any privilege exists and is claimed, or

(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(b) any record the production of which would be contrary to public policy; or

(c) any transcript or recording of evidence taken in the course of another legal proceeding.

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

(a) any other provision of this or any other Act of the Parliament of Canada respecting the admissibility in evidence of any record or the proof of any matter, or

(b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

(12) In this section

“business” means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

“copy”, in relation to any record, includes a print, whether enlarged or not, from a photographic film of such record, and “photographic film” includes a photographic plate, microphotographic film or photostatic negative;

“court” means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

“legal proceeding” means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

“record” includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy

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or transcript received in evidence under this section pursuant to subsection (3) or (4).

Definitions — When print admissible in evidence — Evidence of compliance with conditions — Proof by notarial copy.

31. (1) In this section

“corporation” means the Bank of Canada, the Federal Business Development Bank and any bank to which the *Bank Act* applies, or to which the *Quebec Savings Banks Act* supplies, and each of the following carrying on business in Canada, namely every railway, express, telegraph and telephone company (except a street railway and tramway company), insurance company or society, trust company and loan company (except a company subject to Part II of the *Small Loans Act*);

“government” means the government of Canada or of any province of Canada and includes any department, commission, board or branch of any such government; and

“photographic film” includes any photographic plate, microphotographic film and photostatic negative. 1974-75-76, c. 14, s. 57.

(2) a print, whether enlarged or not, from any photographic film of,

(a) an entry in any book or record kept by any government or corporation and destroyed, lost, or delivered to a customer after such film was taken,

(b) any bill of exchange, promissory note, cheque, receipt, instrument or document held by any government or corporation and destroyed, lost, or delivered to a customer after such film was taken, or

(c) any record, document, plan, book or paper belonging to or deposited with any government or corporation,

is admissible in evidence in all cases in which and for all purposes for which the object photographed would have been received upon proof that

(d) while such book, record, bill of exchange, promissory note, cheque, receipt, instrument or document, plan, book or paper was in the custody or control of the government or corporation, the photographic film was taken thereof in order to keep a permanent record thereof, and

(e) the object photographed was subsequently destroyed by or in the presence of one or more of the employees of the government or corporation, or was lost or was delivered to a customer.

(3) Evidence of compliance with the conditions prescribed by this section may be given by any one or more of the employees of the government or corporation, having knowledge of the taking of the photographic film, of such destruction, loss, or delivery to a customer, or of the making of the print, as the case may be, either orally or by affidavit sworn in any part of Canada before any notary public or commissioner for oaths.

(4) Unless the court otherwise orders, a notarial copy of an affidavit under subsection (3) is admissible in evidence in lieu of the original affidavit.

Order signed by Secretary of State — Copies printed in Canada Gazette.

32. (1) An order in writing, signed by the Secretary of State of Canada, and purporting to be written by command of the Governor General, shall be received in evidence as the order of the Governor General.

(2) All copies of official and other notices, advertisements and documents printed in the *Canada Gazette* are admissible in evidence as *prima facie* proof of the originals, and of the contents thereof.

Proof of handwriting of person certifying — Printed or written.

33. (1) No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, regulation, appointment, book or other document.

(2) Any such copy or extract may be in print or in writing, or partly in print and partly in writing.

Attesting witness — Instrument, how proved.

34. (1) It is not necessary to prove by attesting witness any instrument to the validity of which attestation is not requisite.

(2) Such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto.

Impounding of forged instrument.

35. Where any instrument that has been forged or fraudulently altered is admitted in evidence, the court or the judge or person who admits the instrument may at the request of any person against whom it is admitted in evidence, direct that the instrument shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions, as to the court, judge or person admitting the instrument seem meet.

Construction.

36. This Part shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing Act, or existing at law.

DISCLOSURE OF GOVERNMENT INFORMATION

Objection to disclosure of information — Where objection made to superior court — Where objection not made to superior court — Limitation period — Appeal to court of appeal — Limitation period for appeal under subsection (5) — Limitation periods for appeals to Supreme Court of Canada.

36.1 (1) A Minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

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(2) Subject to sections 36.2 and 36.3, where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.

(3) Subject to sections 36.2 and 36.3, where an objection to the disclosure of information is made under subsection (1) before a court, person or body other than a superior court, the objection may be determined, on application, in accordance with subsection (2) by

- (a) the Federal Court-Trial Division, in the case of a person or body vested with power to compel production by or pursuant to an Act of Parliament if the person or body is not a court established under a law of a province; or
- (b) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

(4) An application pursuant to subsection (3) shall be made within ten days after the objection is made or within such further or lesser time as the court having jurisdiction to hear the application considers appropriate in the circumstances.

(5) An appeal lies from a determination under subsection (2) or (3)

- (a) to the Federal Court of Appeal from a determination of the Federal Court-Trial Division; or
- (b) to the court of appeal of a province from a determination of a trial division or trial court of a superior court of a province.

(6) An appeal under subsection (5) shall be brought within ten days from the date of the determination appealed from or within such further time as the court having jurisdiction to hear the appeal considers appropriate in the circumstances.

(7) Notwithstanding any other Act of Parliament,

- (a) an application for leave to appeal to the Supreme Court of Canada from a judgment made pursuant to subsection (5) shall be made within ten days from the date of the judgment appealed from or within such further time as the court having jurisdiction to grant leave to appeal considers appropriate in the circumstances; and
- (b) where leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 66(1) of the *Supreme Court Act* but within such time as the court that grants leave specifies. 1980-81-82, c. 111, s. 4, Schedule III.

**Objection relating to international relations or national defence or security —
Limitation period — Appeal to Federal Court of Appeal — Subsections
36.1(6) and (7) apply — Special rules for hearings — Ex parte representa-
tions.**

36.2 (1) Where an objection to the disclosure of information is made under

subsection 36.1(1) on grounds that the disclosure would be injurious to international relations or national defence or security, the objection may be determined, on application, in accordance with subsection 36.1(2) only by the Chief Justice of the Federal Court, or such other judge of that court as the Chief Justice may designate to hear such applications.

(2) An application under subsection (1) shall be made within ten days after the objection is made or within such further or lesser time as the Chief Justice of the Federal Court, or such other judge of that court as the Chief Justice may designate to hear such applications, considers appropriate.

(3) An appeal lies from a determination under subsection (1) to the Federal Court of Appeal.

(4) Subsection 36.1(6) applies in respect of appeals under subsection (3), and subsection 36.1(7) applies in respect of appeals from judgments made pursuant to subsection (3), with such modifications as the circumstances require.

(5) An application under subsection (1) or an appeal brought in respect of such application shall

(a) be heard *in camera*; and

(b) on the request of the person objecting to the disclosure of information, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

(6) During the hearing of an application under subsection (1) or an appeal brought in respect of such application, the person who made the objection in respect of which the application was made or the appeal was brought shall, on the request of that person, be given the opportunity to make representations *ex parte*. 1980-81-82, c. 111, s. 4, Schedule III.

Objection relating to a confidence of the Queen's Privy Council — Definition — Idem — Exception.

36.3 (1) Where a Minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

(2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals of recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agenda of Council or a record recording deliberations or decisions of Council;

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- (d) a record used for or reflecting communications or discussions between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and
- (f) draft legislation.

(3) For the purposes of subsection (2), “Council” means the Queen’s Privy Council for Canada, committees of the Queen’s Privy Council for Canada, Cabinet and committees of Cabinet.

(4) Subsection (1) does not apply in respect of

(a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(b) a discussion paper described in paragraph (2)(b)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made. 1980-81-82, c. 111, s. 4, Schedule III.

PROVINCIAL LAWS OF EVIDENCE

How applicable.

37. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings.

STATUTORY DECLARATIONS

Solemn declaration.

38. Any judge, notary public, justice of the peace, police or stipendiary magistrate, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the declaration before him, in the following form, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:

I, A.B., solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

Declared before me
at _____ this _____ day of _____ A.D. 19 ____.

INSURANCE PROOFS

Affidavits, etc.

39. Any affidavit, affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of, or injury to person, property or life insured or assured therein, may be taken before any commissioner or other person authorized to take affidavits or before any justice of the peace, or before any notary public for any province of Canada; and such officer is hereby required to take such affidavit, affirmation or declaration.

PART II APPLICATION

Foreign courts.

40. This Part applies to the taking of evidence relating to proceedings in courts out of Canada.

INTERPRETATION

Definitions.

41. In this Part

“cause” includes a proceeding against a criminal;

“court” means any superior court in any province of Canada; 1983-84, c. 40, s. 27(2)

“judge” means any judge of any superior court in any province of Canada; 1983-84, c. 40, s. 27(2)

“oath” includes affirmation in cases in which, by the law of Canada, or of the province, as the case may be, an affirmation is allowed instead of an oath.

Construction.

42. This Part shall not be so construed as to interfere with the right of legislation of the legislature of any province requisite or desirable for the carrying out of the objects hereof.

PROCEDURE

Order for examination of witness in Canada.

43. Where, upon an application for that purpose, it is made to appear to any court or judge, that any court or tribunal of competent jurisdiction, in the Commonwealth and Dependent Territories, or in any foreign country, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to such matter, of a party or witness within the jurisdiction of such first mentioned court, or of the court to which such judge belongs, or of such judge, the court or judge may, in its or his discretion, order the examination upon oath upon interrogatories, or otherwise,

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before any person or persons named in the order, of such party or witness accordingly, and by the same or any subsequent order may command the attendance of such party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order, and of any other writings or documents relating to the matter in question that are in the possession or power of such party or witness.

Enforcement of the order.

44. Upon the service upon the party or witness of an order referred to in section 43, and of an appointment of a time and place for the examination of such party or witness signed by the person named in the order for taking the examination, or, if more than one person is named, then by one of the persons named, and upon payment or tender of the like conduct money as is properly payable upon attendance at a trial, the order may be enforced in like manner as an order made by the court or judge in a cause depending in such court or before such judge.

Expenses and conduct money.

45. Every person whose attendance is required in manner aforesaid is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial.

Administering oath.

46. Upon any examination of parties or witnesses, under the authority of any order made in pursuance of this Part, the oath shall be administered by the person authorized to take the examination, or, if more than one, then by one of such persons.

Right of refusal to answer or produce document — Nature of right.

47. (1) Any person examined under any order made under this Part has the like right to refuse to answer questions tending to criminate himself, or other questions, as a party or witness, as the case may be, would have in any cause pending in the court by which, or by a judge whereof, the order is made.

(2) No person shall be compelled to produce, under any such order, any writing or other document that he could not be compelled to produce at a trial of such a cause.

Rules of court — Letters rogatory.

48. (1) The court may frame rules and orders in relation to procedure, to the evidence to be produced in support of the application for an order for examination of parties and witnesses under this Part, and generally for carrying this Part into effect.

(2) In the absence of any order in relation to such evidence, letters rogatory from any court of justice in the Commonwealth and Dependent Territories, or from any foreign tribunal, in which such civil, commercial or criminal matter is pending, shall be deemed and taken to be sufficient evidence in support of such applications.

PART III

THE TAKING OF AFFIDAVITS ABROAD

Application of Part III.

49. This Part extends to the following classes of persons:

(a) officers of any of Her Majesty's diplomatic or consular services while exercising their functions in any foreign country, including ambassadors, envoys, ministers, charges d'affaires, counsellors, secretaries, attaches, consuls general, consuls, vice-consuls, pro-consuls, consular agents, acting consuls general, acting consuls, acting vice-consuls and acting consular agents;

(b) officers of the Canadian diplomatic, consular and representative services while exercising their functions in any foreign country, or in any part of the Commonwealth and Dependent Territories other than Canada, including, in addition to the diplomatic and consular officers mentioned in paragraph (a), high commissioners, permanent delegates, acting high commissioners, acting permanent delegates, counsellors and secretaries; and

(c) Canadian Government Trade Commissioners and Assistant Canadian Government Trade Commissioners while exercising their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada.

(d) honorary consular officers of Canada while exercising their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada. 1983-84, c. 40, s. 27(3)

Oaths taken abroad.

50. Oaths, affidavits, affirmations or declarations administered, taken or received outside of Canada by any person mentioned in section 49, are as valid and effectual and are of the like force and effect to all intents and purposes as if they had been administered, taken or received in Canada by a person authorized to administer, take or receive oaths, affidavits, affirmations or declarations therein that are valid and effectual under this Act.

Documents to be admitted in evidence.

51. Any document that purports to have affixed, impressed, or subscribed thereon or thereto, the signature of any person authorized by this Part to administer, take or receive oaths, affidavits, affirmations or declarations, together with his seal or with the seal or stamp of his office, or the office to which he is attached, in testimony of any oath, affidavit, affirmation or declaration being administered, taken or received by him, shall be admitted in evidence, without proof of the seal or stamp or of his signature or of his official character.

CHAPTER 145

The Evidence Act**1. In this Act,**

Interpretation

- (a) “action” includes an issue, matter, arbitration, reference, investigation, inquiry, a prosecution for an offence committed against a statute of Ontario or against a by-law or regulation made under any such statute and any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Ontario;
- (b) “court” includes a judge, arbitrator, umpire, commissioner, justice of the peace or other officer or person having by law or by consent of parties authority to hear, receive and examine evidence. R.S.O. 1970, c. 151, s. 1.

2. This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction. R.S.O. 1970, c. 151, s. 2.

Application of Act

3.—(1) Where by any Act of the Legislature or order of the Assembly an oath is authorized or directed to be administered, the oath may be administered by any person authorized to take affidavits in Ontario.

Administration of oaths

(2) Every court has power to administer or cause to be administered an oath to every witness who is called to give evidence before the court. R.S.O. 1970, c. 151, s. 3.

by courts

4. Where an oath or declaration is directed to be made before a person, he has power and authority to administer it and to certify to its having been made. R.S.O. 1970, c. 151, s. 4.

Certification

5.—(1) Notwithstanding any Act, regulation or the rules of court, a stenographic reporter, shorthand writer, stenographer or other person who is authorized to record evidence and proceedings in an action in a court or in a proceeding authorized by or under any Act may record evidence and the proceedings

Recording of evidence etc.

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Sec. 5 (1)

by any form of shorthand or by any device for recording sound of a type approved by the Attorney General.

Admissibility
of transcripts

(2) Notwithstanding any Act, regulation or the rules of court, a transcript of the whole or a part of any evidence that has or proceedings that have been recorded in accordance with subsection (1) and that has or have been certified in accordance with the Act, regulation or rule of court, if any, applicable thereto and that is otherwise admissible by law is admissible in evidence whether or not the witness or any of the parties to the action or proceeding has approved the method used to record the evidence and the proceedings and whether or not he has read or signed the transcript. R.S.O. 1970, c. 151, s. 5; 1972, c. 1, s. 9 (7).

Witnesses,
not incapa-
citated by
crime etc.

6. No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest. R.S.O. 1970, c. 151, s. 6.

Admissibility
notwith-
standing
interest or
crime

7. Every person offered as a witness shall be admitted to give evidence notwithstanding that he has an interest in the matter in question or in the event of the action and notwithstanding that he has been previously convicted of a crime or offence. R.S.O. 1970, c. 151, s. 7.

Evidence of
parties

8.—(1) The parties to an action and the persons on whose behalf it is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or of any of the parties, and the husbands and wives of such parties and persons are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties.

Evidence of
husband and
wife

(2) Without limiting the generality of subsection (1), a husband or a wife may in an action give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage. R.S.O. 1970, c. 151, s. 8.

Witness not
excused from
answering
questions
tending to
criminate

9.—(1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any act of the Legislature.

Answer not
to be used in
evidence
against him

(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he would therefore be excused from answering such

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question, then, although he is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any civil proceeding or in any proceeding under any Act of the Legislature. R.S.O. 1970, c. 151, s. 9.

10. The parties to a proceeding instituted in consequence of adultery and the husbands and wives of such parties are competent to give evidence in such proceedings, but no witness in any such proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery. R.S.O. 1970, c. 151, s. 10.

Evidence in proceedings in consequence of adultery

11. A husband is not compellable to disclose any communication made to him by his wife during the marriage, nor is a wife compellable to disclose any communication made to her by her husband during the marriage. R.S.O. 1970, c. 151, s. 11.

Communications made during marriage

12. Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding. R.S.O. 1970, c. 151, s. 12.

Expert evidence

13. In an action by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1970, c. 151, s. 14.

Actions by or against heirs, etc.

14. In an action by or against a mentally incompetent person so found, or a patient in a psychiatric facility, or a person who from unsoundness of mind is incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence, unless such evidence is corroborated by some other material evidence. R.S.O. 1970, c. 151, s. 15.

Actions by or against persons under disability

15. An examination for discovery, or any part thereof, of an officer or servant of a corporation made under the rules of court may be used as evidence at the trial by any party adverse in interest to the corporation, subject to such protec-

Use of examination for discovery of officer or servant of corporation at trial

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tion to the corporation as the rules of court provide. R.S.O. 1970, c. 151, s. 16.

Mode of
administer-
ing oath

16. Where an oath may be lawfully taken, it may be administered to a person while such person holds in his hand a copy of the Old or New Testament without requiring him to kiss the same, or, when he objects to being sworn in this manner or declares that the oath so administered is not binding upon his conscience, then in such manner and form and with such ceremonies as he declares to be binding. R.S.O. 1970, c. 151, s. 17.

Affirmation
in lieu
of oath

17.—(1) Where a person objects to being sworn from conscientious scruples, or on the ground of his religious belief, or on the ground that the taking of an oath would have no binding effect on his conscience, he may, in lieu of taking an oath, make an affirmation or declaration that is of the same force and effect as if he had taken an oath in the usual form.

Certifying
affirmation

(2) Where the evidence is in the form of an affidavit or written deposition, the person before whom it is taken shall certify that the deponent satisfied him that he was a person entitled to affirm. R.S.O. 1970, c. 151, s. 18.

Evidence
of child

18.—(1) In any legal proceeding where a child of tender years is offered as a witness and the child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of the child may be received though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

Corrobor-
ation

(2) No case shall be decided upon such evidence unless it is corroborated by some other material evidence. R.S.O. 1970, c. 151, s. 19.

Attendance
of witnesses

19. A witness served in due time with a subpoena issued out of a court in Ontario, and paid his proper witness fees and conduct money, who makes default in obeying such subpoena, without any lawful and reasonable impediment, in addition to any penalty he may incur as for a contempt of court, is liable to an action on the part of the person by whom, or on whose behalf, he has been subpoenaed for any damage that such person may sustain or be put to by reason of such default. R.S.O. 1970, c. 151, s. 20.

(The following provisions were enacted by the Province of Canada as part of Chapter 9 of 1854. They were carried into

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the Consolidated Statutes of Canada, 1859 as sections 4-11 and 13 of Chapter 79. They have appeared in their present form in successive revisions since Confederation. See Rideout vs Rideout (1956) O.W.N. 644.)

4. If in any action or suit depending in any of Her Majesty's Superior Courts of Law or Equity in Canada, it appears to the Court, or when not sitting, it appears to any Judge of the Court that it is proper to compel the personal attendance at any trial or *enquête* or examination of witnesses, of any person who may not be within the jurisdiction of the Court in which the action or suit is pending, the Court or Judge, in their or his discretion, may order that a writ called a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue in special form, commanding such person to attend as a witness at such trial or *enquête* or examination of witnesses wherever he may be in Canada.

Courts may issue subpoenas to any part of Canada

5. The service of any such writ or process in any part of Canada, shall be valid and effectual to all intents and purposes, as if the same had been served within the jurisdiction of the Court from which it has issued, according to the practice of such Court.

Service thereof in any part of Canada to be good

6. No such writ shall be issued in any case in which an action is pending for the same cause of action, in that section of the Province, whether Upper or Lower Canada respectively, within which such witness or witnesses may reside.

When not to be issued

7. Every such writ shall have at the foot or in the margin thereof, a statement or notice that the same is issued by the special order of the Court or Judge making such order, and no such writ shall issue without such special order.

Writs to be specially noted

8. In case any person so served does not appear according to the exigency of such writ or process, the Court out of which the same issued, may, upon proof made of the service thereof, and of such default to the satisfaction of such Court, transmit a certificate of such default, under the seal of the same Court, to any of Her Majesty's Superior Courts of Law or Equity in that part of Canada in which the person so served may reside, being out of the jurisdiction of the Court transmitting such certificate, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as they might have done if such person had neglected or refused to appear to a writ of subpoena or other similar process issued out of such last mentioned Court.

Consequences of disobedience

9. No such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any trial or *enquête* or examination of witnesses, in obedience to any such subpoena or other similar process, unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem* and per mile allowed to witnesses by the law and practice of the Superior Court of Law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence and of returning from giving evidence, had been tendered to such person at the time when the writ of subpoena, or other similar process was served upon him.

If expenses paid or tendered

10. The service of such writs of subpoena or other similar process, in Lower Canada, shall be proved by the certificate of a Bailiff within the jurisdiction where the service has been made, under his oath of office, and

How service proved

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such service in Upper Canada by the affidavit of service endorsed on or annexed to such writ by the person who served the same.

Costs of
attendance
provided for

11. The costs of the attendance of any such witness shall not be taxed against the adverse party to such suit, beyond the amount that would have been allowed on a commission *rogatoire*, or to examine witnesses unless the Court or Judge before whom such trial or *enquête* or examination of witnesses is had, so orders.

Power to
issue com-
missions to
examine
witnesses
preserved

13. Nothing herein contained shall affect the power of any Court to issue a commission for the examination of witnesses out of its jurisdiction, nor affect the admissibility of any evidence at any trial or proceeding, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court.

Examination
of witnesses,
proof of con-
tradictory
written
statements

20. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the matter in question, without the writing being shown to him, but, if it is intended to contradict him by the writing, his attention shall, before such contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of so contradicting him, and the judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he thinks fit. R.S.O. 1970, c. 151, s. 21.

Proof of con-
tradictory
oral
statements

21. If a witness upon cross-examination as to a former statement made by him relative to the matter in question and inconsistent with his present testimony does not distinctly admit that he did make such statement, proof may be given that he did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R.S.O. 1970, c. 151, s. 22.

Proof of
previous
conviction of
a witness

22.—(1) A witness may be asked whether he has been convicted of any crime, and upon being so asked, if he either denies the fact or refuses to answer, the conviction may be proved, and a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted, or by the deputy of the officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

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(2) For such certificate, a fee of \$1 and no more may be demanded or taken. R.S.O. 1970, c. 151, s. 23.

Fee

23. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make such statement. R.S.O. 1970, c. 151, s. 24.

How far a party may discredit his own witness

24. Letters patent under the Great Seal of the United Kingdom, or of any other of Her Majesty's dominions, may be proved by the production of an exemplification thereof, or of the enrolment thereof, under the Great Seal under which such letters patent were issued, and such exemplification has the like force and effect for all purposes as the letters patent thereby exemplified or enrolled, as well against Her Majesty as against all other persons whomsoever. R.S.O. 1970, c. 151, s. 25.

Letters patent

25.—(1) Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be printed by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession within the Queen's dominions, shall be admitted in evidence to prove the contents thereof. R.S.O. 1970, c. 151, s. 26.

Copies of statutes, etc.

(2) Copies of the statutes of Ontario that are translated into the French language and that purport to be published by the Ministry of the Attorney General and printed by the Queen's Printer shall be admitted in evidence to prove the contents thereof but, in the event of a conflict between the version published under the *Statutes Act* and the French language translation, the version published under the *Statutes Act* shall prevail. 1979, c. 48, s. 1.

Copies of French translation

R.S.O. 1980, c. 483

26. *Prima facie* evidence of a proclamation, order, regulation or appointment to office made or issued,

Proclamations, orders etc.

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- (a) by the Governor General or the Governor General in Council, or other chief executive officer or administrator of the Government of Canada; or
- (b) by or under the authority of a minister or head of a department of the Government of Canada or of a provincial or territorial government in Canada; or
- (c) by a Lieutenant Governor or Lieutenant Governor in Council or other chief executive officer or administrator of Ontario or of any other province or territory in Canada.

may be given by the production of,

- (d) a copy of the *Canada Gazette* or of the official gazette for a province or territory purporting to contain a notice of such proclamation, order, regulation or appointment; or
- (e) a copy of such proclamation, order, regulation or appointment purporting to be printed by the Queen's Printer or by the government printer for the province or territory; or
- (f) a copy of or extract from such proclamation, order, regulation or appointment purporting to be certified to be a true copy by such minister or head of a department or by the clerk, or assistant or acting clerk of the executive council or by the head of a department of the Government of Canada or of a provincial or territorial government or by his deputy or acting deputy. R.S.O. 1970, c. 151, s. 27.

Orders
signed by
Secretary
of State or
Provincial
Secretary

27. An order in writing purporting to be signed by the Secretary of State of Canada and to be written by command of the Governor General shall be received in evidence as the order of the Governor General and an order in writing purporting to be signed by a member of the Executive Council and to be written by command of the Lieutenant Governor shall be received in evidence as the order of the Lieutenant Governor. R.S.O. 1970, c. 151, s. 28, *revised*.

Notices in
Gazette

28. Copies of proclamations and of official and other documents, notices and advertisements printed in the *Canada Gazette*, or in *The Ontario Gazette*, or in the official gazette of any province or territory in Canada are *prima facie* evidence of the originals and of the contents thereof. R.S.O. 1970, c. 151, s. 29.

29. Where the original record could be received in evidence, a copy of an official or public document in Ontario, purporting to be certified under the hand of the proper officer, or the person in whose custody such official or public document is placed, or of a document, by-law, rule, regulation or proceeding, or of an entry in a register or other book of a corporation, created by charter or statute in Ontario, purporting to be certified under the seal of the corporation and the hand of the presiding officer or secretary thereof, is receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof. R.S.O. 1970, c. 151, s. 30.

Public or
official
documents

30. Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a ministry of the public service of Ontario, if the deputy head or other officer of the department has the document in his personal possession, and is called as a witness, he is entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the ministry, to object to producing the document on the ground that it is privileged, and such objection may be taken by him in the same manner, and has the same effect, as if such member of the Executive Council or head of the ministry were personally present and made the objection. R.S.O. 1970, c. 151, s. 31; 1972, c. 1, s. 2.

Privilege in
case of
official
documents

31. A copy of an entry in a book of account kept in a department of the Government of Canada or of Ontario shall be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of the department that such book was, at the time of the making of the entry, one of the ordinary books kept in the department, that the entry was apparently, and as the deponent believes, made in the usual and ordinary course of business of the department, and that such copy is a true copy thereof. R.S.O. 1970, c. 151, s. 32.

Entries in
departmental
books

32.—(1) Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, a copy thereof or extract therefrom is admissible in evidence if it is proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original was entrusted.

Copies of
public books
or documents

(2) Such officer shall furnish the certified copy or extract to any person applying for it at a reasonable time, upon his pay-

Copies to be
delivered if
required

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Sec. 32 (2)

ing therefor a sum not exceeding 10 cents for every folio of 100 words. R.S.O. 1970, c. 151, s. 33.

Interpretation
1980-1, c. 40
(Can.)

33. (1) In this section, "bank" means a bank to which the *Bank Act* (Canada) applies or the Province of Ontario Savings Office, and includes a branch, agency or office of any of them.

Copies of
entries in
books as
prima facie
evidence

(2) Subject to this section, a copy of an entry in a book or record kept in a bank is in any action to which the bank is not a party *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded.

Proof
required as
to entry in
ordinary
course of
business

(3) A copy of an entry in such book or record shall not be received in evidence under this section unless it is first proved that the book or record was at the time of making the entry one of the ordinary books or records of the bank, that the entry was made in the usual and ordinary course of business, that the book of record is in the custody or control of the bank, or its successor, and that such copy is a true copy thereof, and such proof may be given by the manager or accountant, or a former manager of the bank or its successor, and may be given orally or by affidavit.

Production
of books to
be required
only under
order

(4) A bank or officer of a bank is not, in an action to which the bank is not a party, compellable to produce any book or record the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court or a judge made for special cause.

Inspection
of account

(5) On the application of a party to an action, the court or judge may order that such party be at liberty to inspect and take copies of any entries in the books or records of a bank for the purposes of such proceeding, but a person whose account is to be inspected shall be served with notice of the application at least two clear days before the hearing thereof, and, if it is shown to the satisfaction of the court or judge that such person cannot be notified personally, such notice may be given by addressing it to the bank.

Costs

(6) The costs of an application to a court or judge under or for the purposes of this section, and the costs of anything done or to be done under an order of a court or judge made under or for the purposes of this section, are in the discretion of the court or judge who may order such costs or any part thereof to be paid to a party by the bank, where such costs have been occasioned by a default or delay on the part of the bank, and any such order against a bank may be enforced as if the bank were a party to the proceeding. R.S.O. 1970, c. 151, s. 34.

Sec. 34 (3)

EVIDENCE

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34.—(1) In this section,

Interpretation

(a) “person” includes,

(i) the Government of Canada and of a province of Canada, and a department, commission, board or branch of any such government,

(ii) a corporation, its successors and assigns, and

(iii) the heirs, executors, administrators or other legal representatives of a person;

(b) “photographic film” includes any photographic plate, microphotographic film and photostatic negative, and “photograph” has a corresponding meaning.

(2) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement, document, plan or a record or book or entry therein kept or held by a person,

Admissible
in evidence

(a) is photographed in the course of an established practice of such person of photographing objects of the same or a similar class in order to keep a permanent record thereof; and

(b) is destroyed by or in the presence of such person or of one or more of his employees or delivered to another person in the ordinary course of business or lost,

a print from the photographic film is admissible in evidence in all cases and for all purposes for which the object photographed would have been admissible.

(3) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement or other executed or signed document was so destroyed before the expiration of six years from,

Court may
refuse to
admit in
evidence

(a) The date when in the ordinary course of business either the object or the matter to which it related ceased to be treated as current by the person having custody or control of the object; or

(b) The date of receipt by the person having custody or control of the object of notice in writing of a claim in respect of the object or matter prior to the destruction of the object,

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Sec. 34 (3)

whichever is the later date, the court may refuse to admit in evidence under this section a print from a photographic film of the object.

Exception

(4) Where the photographic print is tendered by a government or the Bank of Canada, subsection 3 does not apply.

Proof of compliance with conditions

(5) Proof of compliance with the conditions prescribed by this section may be given by any person having knowledge of the facts either orally or by affidavit sworn before a notary public, and, unless the court otherwise orders, a notarial copy of any such affidavit is admissible in evidence in lieu of the original affidavit. R.S.O. 1970, c. 151, s. 35.

Interpretation

35.—(1) In this section,

- (a) “business” includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;
- (b) “record” includes any information that is recorded or stored by means of any device.

Where business records admissible

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

Notice and production

(3) Subsection 2 does not apply unless the party tendering the writing or record has given at least seven days notice of his intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

Surrounding circumstances

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

Previous rules as to admissibility and privileged documents not affected

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged. R.S.O. 1970, c. 151, s. 36.

Judicial notice to be taken of signatures of Judges, etc.

36.—(1) All courts, judges, justices, masters, clerks of courts, commissioners and other officers acting judicially, shall

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EVIDENCE

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take judicial notice of the signature of any judge of any court in Canada, in Ontario and every other province and territory in Canada, where his signature is appended or attached to a decree, order, certificate, affidavit, or judicial or official document.

(2) The members of the Canadian Transport Commission and of the Ontario Municipal Board, the Mining and Lands Commissioner appointed under the *Ministry of Natural Resources Act* and a referee appointed under the *Drainage Act* shall be deemed judges for the purposes of this section. R.S.O. 1970, c. 151, s. 37; 1973, c. 105, s. 4.

Interpretation

R.S.O. 1980,
cc. 285, 126

37. No proof is required of the handwriting or official position of a person certifying to the truth of a copy of or extract from any proclamation, order, regulation or appointment, or to any matter or thing as to which he is by law authorized or required to certify. R.S.O. 1970, c. 151, s. 38.

Proof of
handwriting,
when not
required

38. A judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature or in any court of record in England or Ireland or in any of the superior courts of law, equity or bankruptcy in Scotland, or in any court of record in Canada, or in any of the provinces or territories in Canada, or in any British colony or possession, or in any court of record of the United States of America, or of any state in the United States of America, may be proved by an exemplification of the same under the seal of the court without any proof of the authenticity of such seal or other proof whatever, in the same manner as a judgment, decree or other judicial proceeding of the Supreme Court in Ontario may be proved by an exemplification thereof. R.S.O. 1970, c. 151, s. 39.

Foreign
judgments,
etc., how
proved

39.—(1) A copy of a notarial act or instrument in writing made in Quebec before a notary and filed, enrolled or enregistered by such notary, certified by a notary or prothonotary to be a true copy of the original thereby certified to be in his possession as such notary or prothonotary, is receivable in evidence in the place and stead of the original, and has the same force and effect as the original would have if produced and proved.

Copies of
notarial acts
in Quebec
admissible

(2) The proof of such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a notary, or be filed, enrolled or enregistered by a notary. R.S.O. 1970, c. 151, s. 40.

How
impeached

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(2) A document that purports to be signed by a person mentioned in subsection 1 in testimony of an oath, affidavit, affirmation or statutory declaration having been administered, sworn, affirmed or made before him and on which his rank and unit shown below his signature is admissible in evidence without proof of his signature or of his rank or unit or that he is on full-time service. R.S.O. 1970, c. 151, s. 45. Admissibility

45.—(1) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made outside Ontario before, Oaths, etc.,
administered
outside
Ontario

- (a) a judge;
- (b) a magistrate;
- (c) an officer of a court of justice;
- (d) a commissioner for taking affidavits or other competent authority of the like nature;
- (e) a notary public;
- (f) the head of a city, town, village, township or other municipality;
- (g) an officer of any of Her Majesty's diplomatic or consular services, including an ambassador, envoy, minister, charge d'affairs, counsellor, secretary, attache, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul and acting consular agent;
- (h) an officer of the Canadian diplomatic, consular or representative services, including, in addition to the diplomatic and consular officers mentioned in clause (g), a high commissioner, permanent delegate, acting high commissioner, acting permanent delegate, counsellor and secretary; or
- (i) a Canadian Government trade commissioner or assistant trade commissioner,

exercising his functions or having jurisdiction or authority as such in the place in which it is administered, sworn, affirmed or made, is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario.

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Sec. 45 (2)

Idem

(2) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made outside Ontario before a notary public for Ontario or before a commissioner for taking affidavits in Ontario is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario.

Admissibility

(3) A document that purports to be signed by a person mentioned in subsection (1) or (2) in testimony of an oath, affidavit, affirmation or statutory declaration having been administered, sworn, affirmed or made before him, and on which his office is shown below his signature, and

- (a) in the case of a notary public, that purports to have impressed thereon or attached thereto his official seal;
- (b) in the case of a person mentioned in clause (f) of subsection 1, that purports to have impressed thereon or attached thereto the seal of the municipality;
- (c) in the case of a person mentioned in clause (g), (h) or (i) of subsection 1, that purports to have impressed thereon or attached thereto his seal or the seal or stamp of his office or of the office to which he is attached,

is admissible in evidence without proof of his signature or of his office or official character or of the seal or stamp and without proof that he was exercising his functions or had jurisdiction or authority in the place in which the oath, affidavit, affirmation or statutory declaration was administered, sworn, affirmed or made. R.S.O. 1970, c. 151, s. 46.

Formal defects, when not to vitiate R.S.O. 1980, c. 75

46. No informality in the heading or other formal requisites to any affidavit, declaration or affirmation made or taken before a commissioner or other person authorized to take affidavits under *The Commissioners for Taking Affidavits Act*, or under this Act, is any objection to its reception in evidence if the court or judge before whom it is tendered thinks proper to receive it. R.S.O. 1970, c. 151, s. 47.

Affidavit sworn by solicitor for a party

47. An affidavit or declaration is not inadmissible or unusable in evidence in an action for the reason only that it is made before the solicitor of a party to the action or before the partner, associate, clerk or agent of such solicitor. 1976, c. 17, s. 1.

48.—(1) Where an examination or deposition of a party or witness has been taken before a judge or other officer or person appointed to take it, copies of it, certified under the hand of the judge, officer or other person taking it, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. R.S.O. 1970, c. 151, s. 48.

Admissibility
of copies of
depositions

(2) An examination or deposition received or read in evidence under subsection (1) shall be presumed to represent accurately the evidence of the party or witness, unless there is good reason to doubt its accuracy. 1984, c. 11, s. 176(1).

49. In order to establish a devise or other testamentary disposition of or affecting real estate, probate of the will or letters of administration with the will annexed containing such devise or disposition, or a copy thereof, under the seal of the surrogate court granting the same, or under the seal of the Supreme Court, where the probate or letters of administration were granted by the former court of probate for Upper Canada, are *prima facie* evidence of the will and of its validity and contents. R.S.O. 1970, c. 151, s. 49.

Effect of
probate, etc.
as evidence
of will, etc.

50.—(1) Where a person dies in any of Her Majesty's possessions outside Ontario having made a will sufficient to pass real estate in Ontario, purporting to devise, charge or affect real estate in Ontario, the party desiring to establish any such disposition, after giving one month's notice to the opposite party to the proceeding of his intentions so to do, may produce and file the probate of the will or letters of administration with the will annexed or a certified copy thereof under the seal of the court that granted the same with a certificate of the judge, registrar or clerk of such court that the original will is filed and remains in the court and purports to have been executed before two witnesses, and such probate or letters of administration or certified copy with such certificate is, unless the court otherwise orders, *prima facie* evidence of the will and of its validity and contents.

Proof in the
case of will
of real estate
filed in
courts
outside
Ontario

(2) The production of the certificate mentioned in subsection (1) is sufficient *prima facie* evidence of the facts therein stated and of the authority of the judge, registrar or clerk, without proof of his appointment, authority or signature. R.S.O. 1970, c. 151, s. 50.

Effect of
certificate

51. The production of a certificate, purporting to be signed by an authority authorized in that behalf by the *National Defence Act* or by regulations made thereunder, stating that the person named in the certificate died, or was deemed to have died, on a date set forth therein, is *prima facie* proof for any purpose to which the authority of the Legislature extends

Military
records
R.S.C. 1970,
c. N-4

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that the person so named died on that date, and also of the office, authority and signature of the person signing the certificate, without any proof of his appointment, authority or signature. R.S.O. 1970, c. 151, s. 51.

Medical
reports

52.—(1) Any medical report obtained by or prepared for a party to an action and signed by a legally qualified medical practitioner licensed to practise in any part of Canada is, with the leave of the court and after at least seven days notice has been given to all other parties, admissible in evidence in the action.

Notice and
production

(2) Unless otherwise ordered by the court, a party to an action is entitled to obtain the production for inspection of any report of which notice has been given under subsection (1) within five days after giving notice to produce the report.

Report
required

(3) Except by leave of the judge presiding at the trial, a legally qualified medical practitioner who has medically examined any party to the action shall not give evidence at the trial touching upon such examination unless a report thereof has been given to all other parties in accordance with subsection (1).

Where doctor
called
unnecessarily

(4) Where a legally qualified medical practitioner has been required to give evidence *viva voce* in an action and the court is of opinion that the evidence could have been produced as effectively by way of a medical report, the court may order the party that required the attendance of the medical practitioner to pay as costs therefor such sum as it considers appropriate. R.S.O. 1970, c. 151, s. 52.

Interpretation
R.S.O. 1980,
c. 445

53.—(1) In this section, “instrument” has the meaning assigned to it in section 1 of *The Registry Act*.

Registered
instrument as
evidence

(2) A copy of an instrument or material, certified under the hand and seal of office of the registrar or master of titles, in whose office it is deposited, filed, kept or registered, to be a true copy, is *prima facie* evidence of the original, except in the cases provided for in subsection (3).

Where
certified
copies of
registered
instruments
may be used

(3) Where it would be necessary to produce and prove an instrument or memorial that has been so deposited, filed, kept or registered in order to establish such instrument or memorial and the contents thereof, the party intending to prove it may give notice to the opposite party, at least ten days before the trial or other proceeding in which the proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence, as proof of the instrument or memorial, a copy thereof certified by the registrar or master of titles,

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under his hand and seal of office, and in every such case the copy so certified in sufficient evidence of the instrument or memorial and of its validity and contents unless the party receiving the notice, within four days after such receipt, gives notice that he disputes its validity, in which case the costs of producing and proving it may be ordered to be paid by any or either of the parties as is considered just. R.S.O. 1970, c. 151, s. 53.

54.—(1) Where a public officer produces upon a subpoena an original document, it shall not be deposited in court unless otherwise ordered, but, if the document or a copy is needed for subsequent reference or use, a copy thereof or of so much thereof as is considered necessary, certified under the hand of the officer producing the document or otherwise proved, shall be filed as an exhibit in the place of the original, and the officer is entitled to receive in addition to his ordinary fees the fees for any certified copy, to be paid to him before it is delivered or filed.

Filing copies
of official
documents

(2) Where an order is made that the original be retained, the order shall be delivered to the public officer and the exhibit shall be retained in court and filed. R.S.O. 1970, c. 151, s. 54.

When
original
to be
retained

55.—(1) A party intending to prove the original of a telegram, letter, shipping bill, bill of lading, delivery order, receipt, account or other written instrument used in business or other transactions, may give notice to the opposite party, ten days at least before the trial or other proceeding in which the proof is intended to be adduced, that he intends to give in evidence as proof of the contents as writing purporting to be a copy of the documents, and in the notice shall name some convenient time and place for the inspection thereof.

Proof of
certain
written
instruments

(2) Such copy may then be inspected by the opposite party, and is without further proof sufficient evidence of the contents of the original document, and shall be accepted and taken in lieu of the original, unless the party receiving the notice within four days after the time mentioned for such inspection gives notice that he intends to dispute the correctness or genuineness of the copy at the trial or proceeding, and to require proof of the original, and the costs attending any production or proof of the original document are in the discretion of the court. R.S.O. 1970, c. 151, s. 55.

Inspection

56. It is not necessary to prove, by the attesting witness, an instrument to the validity of which attestation is not requisite. R.S.O. 1970, c. 151, s. 56.

Where no
attestation
required

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EVIDENCE

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Comparison
of disputed
writing with
genuine

57. Comparison of a disputed writing with a writing proved to the satisfaction of the court to be genuine shall be permitted to be made by a witness, and such writings and the evidence of witnesses respecting them may be submitted to the court or jury as evidence of the genuineness or otherwise of the writing in dispute. R.S.O. 1970, c. 151, s. 57.

Where
instruments
offered in
evidence may
be
impounded

58. Where a document is received in evidence, the court admitting it may direct that it be impounded and kept in such custody for such period and subject to such conditions as seem proper, or until the further order of the court or of the Supreme Court or of a judge thereof or of a county or district court, as the case may be. R.S.O. 1970, c. 151, s. 58.

Evidence
dispensed
with under
R.S.O. 1980,
c. 520

59. It is not necessary in an action to produce any evidence that, by section 1 of *The Vendors and Purchasers Act*, is dispensed with as between vendor and purchaser, and the evidence declared to be sufficient as between vendor and purchaser is *prima facie* sufficient for the purposes of the action. R.S.O. 1970, c. 151, s. 59.

Evidence for
foreign
tribunals

60.—(1) Where it is made to appear to the Supreme Court or a judge thereof, or to a judge of a county or district court, that a court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, for a purpose for which a letter of request could be issued under the Rules of Civil Procedure, the obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the court of judge so applied to, such court or judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process, and may, by the same or by a subsequent order, command the attendance of a person named therein for the purpose of being examined, or the production of a writing or other document or thing mentioned in the order, and may give all such directions as to the time and place of the examination, and all other matters connected therewith as seem proper, and the order may be enforced, and any disobedience thereto punished, in like manner as in the case of an order made by the same court or judge in an action pending in such court or before such judge. 1984, c. 11, s. 176(2).

Payment of
expenses of
witness

(2) A person whose attendance is so ordered is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the Supreme Court.

Sec. 60 (4)

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(3) A person examined under such commission, order or process has the like right to object to answer questions tending to criminate himself, and to refuse to answer any questions that, in an action pending in the court by which or by a judge whereof or before the judge by whom the order for examination was made, the witness would be entitled to object or to refuse to answer, and no person shall be compelled to produce at the examination any writing, document or thing that he could not be compelled to produce at the trial of such an action.

Right of
refusal to
answer
questions and
to produce
documents

(4) Where the commission, order or other process, or the instructions of the court accompanying the same, direct that the person to be examined shall be sworn or shall affirm, the person so appointed has authority to administer the oath to him or take his affirmation. R.S.O. 1970, c. 151, s. 60.

Adminis-
tration of
oath

CHAPTER 182

Game and Fish Act**1. In this Act,**Interpre-
tation

1. “amphibian” means any species of Amphibia that the Lieutenant Governor in Council declares to be an amphibian and includes any part and the eggs of such species;
2. “Board” means the Game and Fish Hearing Board referred to in section 38;
3. “body-gripping trap” means a trap designed to capture an animal by seizing and holding the animal by any part of its body but does not include a trap designed to capture a mouse or a rat;
4. “closed season” means a period that is not an open season;
5. “dog” means any of the species *Canis familiaris* Linnaeus;
6. “domestic animals and domestic birds” includes any non-native species kept in captivity, except pheasants, and any fur-bearing animal kept on a fur farm, as defined in the *Fur Farms Act*, but does not include native species otherwise kept in captivity or non-native species present in the wild state; R.S.O. 1980,
c. 181
7. “farmer” means a person whose chief occupation is farming and,
 - i. who is living upon and tilling his own land, or land to the possession of which he is for the time being entitled, or
 - ii. who is a *bona fide* settler engaged in clearing land for the purpose of bringing it to a state of cultivation;

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8. "ferret" means any of the domesticated forms of the old world polecat (*Putorius putorius*) used for hunting;
9. "fire-arm" includes an air or pellet gun and a long-bow and a cross-bow;
10. "fishing preserve" means an artificial or man-made body of water lying wholly within the boundaries of privately-owned land, containing water from surface run-off, natural springs, ground water or water diverted or pumped from a stream or lake but not being composed of natural streams, ponds or lakes or water impounded by the damming of natural streams and in which fish propagated under a licence or fish taken under a commercial fishing licence are released for angling purposes;
11. "fur-bearing animal" means a beaver, fisher, fox, lynx, marten, mink, muskrat, otter, raccoon, skunk, red squirrel, weasel, wolverine or any other animal that the Lieutenant Governor in Council declares to be a fur-bearing animal, and includes any part of such animal;
12. "game" means a game animal, game bird or fur-bearing animal, and includes any part of such animal;
13. "game animal" means any animal, except a fur-bearing animal, protected by this Act, and includes any part of such animal;
14. "game bird" means any bird protected by this Act or the *Migratory Birds Convention Act* (Canada), and includes any part of such bird;
15. "game bird hunting preserve" means any area in which pheasants or other game birds propagated under a licence are released for hunting purposes;
16. "holder of a licence" means the person named in the licence;
17. "hunting" includes chasing, pursuing, following after or on the trail of, searching for, shooting, shooting at, stalking or lying in wait for, worrying, molesting, taking or destroying any animal or bird, whether or not the animal or bird be then or subsequently captured, injured or killed, and "hunt",

R.S.O. 1970,
c. M-12

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“hunted” and “hunter” have corresponding meanings;

18. “leg-hold trap” means a trap designed to capture an animal by seizing and holding the animal by the leg or foot;
19. “licence” means an instrument issued under this Act conferring upon the holder the privilege of doing the things set forth in it, subject to the conditions, limitations and restrictions contained in it and in this Act and in the regulations, but no licence is or shall operate as a lease;
20. “Minister” means the Minister of Natural Resources;
21. “Ministry” means the Ministry of Natural Resources;
22. “non-resident” means a person who has not actually resided in Ontario for a period of at least seven months during the twelve months immediately preceding the time that his residence becomes material under this Act;
23. “officer” means a conservation officer or a deputy conservation officer and includes a member of the Royal Canadian Mounted Police Force, a member of a police force appointed under the *Police Act* and any other person authorized to enforce this Act; R.S.O. 1980, c. 381
24. “Ontario Fishery Regulations” means the Ontario Fishery Regulations made under the *Fisheries Act* (Canada); R.S.C. 1970, c. F-14
25. “open season” means a specified period during which specified game or fish may be taken;
26. “owner”, with reference to land, includes any person who is the owner of an interest in land entitling him to the possession of it, but does not include the holder of a timber licence;
27. “pelt” means the untanned skin of a fur-bearing animal;
28. “pheasant” means any of the species *Phasianus colchicus* Linnaeus;

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29. "power-boat" means any device that is capable of floating and to which is affixed a motor as a means of propulsion and includes any floating device towed by a powerboat;
30. "rabbit" includes cottontail rabbit, varying hare and European hare;
31. "regulations" means the regulations made under this Act;
32. "reptile" means any species of Reptilia that the Lieutenant Governor in Council declares to be a reptile and includes any part and the eggs of such species;
33. "resident" means a person who has actually resided in Ontario for a period of at least seven months during the twelve months immediately preceding the time that his residence becomes material under this Act;
34. "snare" means a device for the taking of animals whereby they are caught in a noose; and "snaring" has a corresponding meaning;
35. "trap" means a spring trap, body-gripping trap, leg-hold trap, gin, deadfall, snare, box or net used to capture an animal, and "trapping" has a corresponding meaning;
36. "vehicle" means a vehicle that is drawn, propelled or driven by any kind of power, including muscular power, and includes the rolling stock of a railway;
37. "vessel" means a boat or ship, and includes a skiff, canoe, punt and raft;
38. "wolf" means any of the species *Canis lupus* L. or *Canis latrans* Say. R.S.O. 1970, c. 186, s. 1; 1971, c. 30, s. 1; 1972, c. 4, s. 12; 1973, c. 108, s. 1; 1980, c. 47, s. 1.

APPLICATION

Application
of Act

2.—(1) This Act does not apply,

- (a) to domestic animals and domestic birds, except dogs, or, subject to subsection (2), fur-bearing ani-

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mals kept on a fur farm as defined in the *Fur Farms Act*; R.S.O. 1980, c. 181

- (b) to a person taking or destroying any animal, other than a caribou, deer, elk or moose or an animal protected under the *Endangered Species Act*, by any means that do not cause unnecessary suffering and at any time on his own land where he finds such animal damaging or destroying his property or, on reasonable grounds, he believes such animal is about to damage or destroy his property; R.S.O. 1980, c. 138
- (c) to a person destroying a beaver dam in defence or preservation of his property. R.S.O. 1970, c. 186, s. 2; 1971, c. 30, s. 2 (1); 1980, c. 47, s. 2 (1).

(2) This Act applies to fur-bearing animals kept on a fur farm as defined in the *Fur Farms Act*, in respect of offences against sections 67 and 69. 1971, c. 30, s. 2 (2). *Idem*

(3) Notwithstanding subsection (1), this Act applies to domestic animals and to persons referred to in clause (1) (b) in respect of the restrictions in section 30 on the use of body-gripping traps and leg-hold traps. 1980, c. 47, s. 2 (2). *Idem*

ADMINISTRATION

3. The purpose of this Act is to provide for the management, perpetuation and rehabilitation of the wildlife resources in Ontario, and to establish and maintain a maximum wildlife population consistent with all other proper uses of lands and waters. R.S.O. 1970, c. 186, s. 3. *Purpose of the Act*

4. The administration of this Act is under the control and direction of the Minister. R.S.O. 1970, c. 186, s. 4. *Administration of Act*

5. Except as otherwise provided by this Act, all rentals, licence fees, fines, penalties, proceeds of the sale of game and fish and of all property forfeited, and other receipts, fees and revenues under this Act or the regulations, or under any licence or instrument authorized by or under this Act, shall be paid to the Treasurer of Ontario. R.S.O. 1970, c. 186, s. 5. *Revenue*

6.—(1) Land may be acquired under the *Ministry of Government Services Act* for the purposes of management, perpetuation and rehabilitation of the wildlife resources in Ontario. R.S.O. 1970, c. 186, s. 6 (1); 1973, c. 2, s. 2. *Power to acquire lands under*
R.S.O. 1980, c. 279

(2) The Minister on behalf of Her Majesty in right of Ontario may receive and take from any person by grant, gift, *Idem*

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devise, bequest or otherwise any property, real or personal, or any interest therein for the purposes mentioned in subsection (1). R.S.O. 1970, c. 186, s. 6 (2).

Management
agreements

(3) The Minister or the Minister of Government Services may enter into agreements with the owners of lands respecting the management of the lands for the purposes mentioned in subsection (1), and such agreements may transfer to Her Majesty in right of Ontario the hunting and fishing rights in the lands and may authorize Her Majesty to carry out habitat improvement work, protective measures, stocking programs, fencing, erection of signs and any other management practice. R.S.O. 1970, c. 186, s. 6 (3); 1973, c. 2, s. 2.

Registration
of
agreements

(4) An agreement entered into under subsection (3) may be registered in the proper land registry office, and thereupon such agreement is binding upon every subsequent owner and mortgagee of the lands during the term of the agreement. R.S.O. 1970, c. 186, s. 6 (4).

Appoint-
ment of
conservation
officers

7.—(1) The Minister may appoint conservation officers for carrying out this Act and the regulations. R.S.O. 1970, c. 186, s. 7 (1).

Deputy
conservation
officers

(2) The Minister may appoint deputy conservation officers in and for any part of Ontario. 1980, c. 47, s. 3.

Termination
of appoint-
ments

(3) Every appointment under subsection (2) shall be for the period stated in the appointment. R.S.O. 1970, c. 186, s. 7 (3).

Search of
vehicles,
vessels, etc.

8.—(1) An officer may, without a search warrant,

- (a) stop, enter and search any aircraft, vehicle or vessel;
- (b) enter and search any fishing, hunting, mining, lumber or construction camp, or any office of any common carrier, or any premises where pelts are bought or sold; and
- (c) open and inspect any trunk, box, bag, parcel or receptacle,

if he has reasonable grounds to believe that any of them contains any game or fish killed, taken, shipped or had in possession in contravention of this Act or the regulations.

Search
warrant

(2) An officer who has reasonable grounds to believe that it is necessary to enter any building, which by this Act he is not

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authorized to enter without a search warrant, shall make a deposition before a justice of the peace, and, where the justice is satisfied that there is reasonable ground for believing that there is in the building,

- (a) anything upon or in respect of which an offence against this Act or the regulations has been or is suspected to have been committed; or
- (b) anything that there is reasonable ground to believe will afford evidence as to the commission of any such offence,

he may at any time issue a search warrant.

(3) An officer may use as much force as is necessary for him to exercise the powers conferred upon him by subsection (1) or in the execution of a search warrant issued under subsection (2). R.S.O. 1970, c. 186, s. 8. Use of force

9. An officer may inspect any fire-arm in a locality in which game may be found or on any highway or road leading thereto or on waters adjacent thereto. R.S.O. 1970, c. 186, s. 9.(a) Inspection of
fire-arms

10. An officer on view may arrest without process any person found committing a contravention of this Act or of the regulations, in which case he shall bring him with reasonable diligence before a competent court to be dealt with according to law. R.S.O. 1970, c. 186, s. 10. Arrest on
view

11. An officer in the discharge of his duties and any person by him accompanied or authorized for the purpose may enter upon and pass through or over private lands without being liable for trespass. R.S.O. 1970, c. 186, s. 11. Entry upon
private
property

12.—(1) An officer shall investigate all contraventions of this Act and the regulations brought to his notice and may prosecute any person who he has reasonable cause to believe is guilty of an offence against this Act. Authority to
prosecute

(2) Subsection (1) does not apply to contraventions of subsection 18(1). R.S.O. 1970, c. 186, s. 12. Where subs.
(1) not to
apply

13. No person shall obstruct, hinder or delay or interfere with an officer in the discharge of his duty by violence or threats or by giving false information, or in any other manner. R.S.O. 1970, c. 186, s. 13. Obstructing
officers

14. An officer may stop a vehicle or vessel for the purpose of, Authority to
stop vehicles,
vessels

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- (a) determining whether the occupants of the vehicle or vessel have been hunting or fishing; or
- (b) obtaining information as to the number and species of game or fish taken. R.S.O. 1970, c. 186, s. 14.

Power of
inspection of
documents by
officers

15. No person shall refuse to allow an officer to examine any book, invoice or document containing any entry or memorandum relating to game or fish that the officer suspects of being taken or possessed in contravention of this Act or the regulations, and he shall afford every reasonable facility for the examination, and, upon refusal, the officer may, without a search warrant, break any lock or fastening that may be necessary in order to conduct the examination and remove any such book, invoice or document to safekeeping. R.S.O. 1970, c. 186, s. 15.

Seizure of
aircraft, etc.

16.—(1) An officer may, without a warrant, seize any vessel, vehicle, aircraft, implement, appliance, material, container, goods, equipment, game or fish where the officer on reasonable grounds believes that,

- (a) the vessel, vehicle, aircraft, implement, appliance, material, container, goods or equipment has been used in connection with the commission of an offence against this Act;
- (b) the game or fish or any part thereof has been hunted, taken, killed, transported, bought, sold or had in possession contrary to any provision of this Act or the regulations; or
- (c) the game or fish or part thereof has been intermixed with any game or fish referred to in clause (b).

Custody of
property
seized

(2) Subject to subsections (4), (5) and (6), any thing seized under subsection (1) shall be delivered into the custody of such person as the Minister directs for safekeeping pending the conclusion of any investigation or the disposition by a court of any charge laid as a result of the investigation.

Disposition
of property
seized where
no charges
are laid, etc.

(3) Where,

- (a) no charge is laid at the conclusion of an investigation; or
- (b) any charge that has been laid is withdrawn or dismissed,

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any thing seized under subsection (1), other than game or fish that has been disposed of under subsection (4), shall be returned to the person from whom it was seized or to his personal representative.

(4) Where, in the opinion of the person having custody of any game or fish seized under subsection (1), such game or fish will rot, spoil or otherwise perish, that person may dispose of the game or fish by donation to any charitable organization.

Disposition
of perishable
property
seized

(5) Where the ownership of any implement, appliance, material, container, goods, equipment, game or fish seized under subsection (1) cannot, at the time of seizure, be ascertained, such implement, appliance, material, container, goods, equipment, game or fish is, upon the seizure thereof, forfeited to the Crown in right of Ontario as represented by the Minister and may be disposed as the Minister directs.

Disposition
of property
seized

(6) Where a person is convicted of an offence against this Act, the court, in addition to any fine imposed, may order that any vessel, vehicle, aircraft, implement, appliance, material, container, goods, equipment, game or fish seized under subsection (1) be forfeited, and upon such order being made, such vessel, vehicle, aircraft, implement, appliance, material, container, goods, equipment, game or fish ordered to be forfeited is forfeited to the Crown in right of Ontario as represented by the Minister and may be disposed of as the Minister directs. 1980, c. 47, s. 4.

Forfeiture of
property
seized

GENERAL PROVISIONS

17.—(1) Except with the written authority of the Minister and subject to such terms and conditions as he may impose, no person shall,

Hunting or
trapping for
hire

- (a) hunt for hire, gain or reward, or hope thereof, or employ, hire or, for valuable consideration, induce any other person to hunt; or
- (b) trap for hire, gain or reward, or hope thereof, or employ, hire or, for valuable consideration, induce any other person to trap.

(2) Clause (1) (b) does not apply to the holder of a licence to hunt or trap fur-bearing animals or a person who is nominated by the holder of the licence in accordance with the regulations to trap in his stead. 1980, c. 47, s. 5.

Exception

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Entry after
notice

18.—(1) No person shall hunt or fish or with any gun or sporting implement, fishing rod or tackle in his possession go upon any enclosed or unenclosed land or water after he has had oral or written notice not to hunt or fish thereon by the owner or by a person authorized by the owner to give such notice.

Wrongful
erection or
destruction of
notices

(2) No person shall,

- (a) without authority give or cause to be given the notice mentioned in subsection (1); or
- (b) tear down, remove, deface, damage or interfere with any notice put up, posted or placed pursuant to subsection (1).

Growing
crops

(3) No person shall, for the purpose of hunting or fishing, enter into or allow a dog to enter into growing or standing grain or any other crop, whether of one kind or not, without the permission of the owner or a person authorized by the owner to give such permission.

Hunting in
parties
exceeding
twelve

(4) No person in a party of more than twelve persons shall hunt or with any gun or sporting implement enter upon any enclosed or unenclosed land in a county without the permission of the owner or a person authorized by the owner to give such permission. R.S.O. 1970, c. 186, s. 18 (1-4).

Entry on
Crown lands
used for
propagating
or retaining
game or fish

(5) No person shall enter or attempt to enter upon lands owned by the Crown that are used for the purpose of propagating or retaining game or fish without,

- (a) authority; or
- (b) paying the fee prescribed by the regulations. 1973, c. 108, s. 2 (1)

Destruction
of notices or
signs

(6) No person shall tear down, remove, damage, deface or interfere with any notice or sign of the Ministry put up, posted or placed for the purposes of this Act. R.S.O. 1970, c. 186, s. 18 (6); 1972, c. 1, s. 1.

Common law
remedy for
trespass

(7) Nothing in this section limits or in any way affects the remedy at common law of an owner for trespass.

Right of
apprehension

(8) Every person found contravening any provision of this section may be apprehended without warrant by a constable or by the owner of the land on which the contravention takes place, or by the servant of or by any person authorized by such owner, and be taken forthwith to a justice of the peace

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to be dealt with according to law. R.S.O. 1970, c. 186, s. 18 (7, 8).

(9) A copy of a letter purporting to be signed by the Minister authorizing any person to give the notice referred to in subsection (1) in respect of any land owned by the Crown is *prima facie* evidence of such letter and of the contents thereof. 1973, c. 108, s. 2 (2).

Copy of
Minister's
letter to be
evidence

(10) Except in accordance with a system established or approved by the Lieutenant Governor in Council, no patentee of railway lands and no owner or tenant who is a subsidiary of or affiliated with a patentee of railway lands shall charge any fee for the use of his railway lands for the purpose of hunting or fishing, and no such patentee, owner or tenant shall prohibit any person from hunting or fishing on such railway lands.

Hunting and
fishing on
railway lands

(11) In this section, "railway lands" includes all lands heretofore or hereafter set apart under any general or special Act of the Legislature as a land subsidy or otherwise in aid of any railway or of any works in connection therewith or of any works to be established, maintained or carried on by any railway. 1980, c. 10, s. 2 (1).

Interpre-
tation

19. Every person is guilty of the offence of hunting carelessly who, being in possession of a fire-arm for the purpose of hunting, discharges or causes to be discharged or handles such fire-arm without due care and attention or without reasonable consideration for persons or property and is liable to a fine of not more than \$5,000, or to imprisonment for a term of not more than one year, or to both. R.S.O. 1970, c. 186, s. 19; 1980, c. 47, s. 6.

Offence of
hunting
carelessly

20.—(1) Except as provided in the regulations, no person shall use an aircraft while hunting.

Use of
aircraft

(2) No person shall use a vehicle or vessel for the purpose of chasing, pursuing, worrying, molesting, killing, injuring or destroying any animal or bird.

Use of
vehicles and
vessels

(3) Subsection (2) does not apply to a farmer in the defence or preservation of his property or to a party of farmers in the defence or preservation of the property of one or more of them. R.S.O. 1970, c. 186, s. 20.

Exception

21.—(1) No person, while engaged in hunting or trapping game or while going to or returning from a hunting camp or locality in which game may be found, shall,

Fire-arms in
game areas

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- (a) have a loaded fire-arm in or on, or discharge a loaded fire-arm from, an aircraft or a vehicle; or
- (b) in any county, or any regional municipality that consists of lands that were formerly in a county, designated in the regulations, discharge a fire-arm from or across a highway, road, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, used or intended for use by the public for the passage of vehicles; or
- (c) in any part of Ontario that is not in a county or regional municipality designated in the regulations, discharge a fire-arm from or across the travelled portion of a highway, road, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, used or intended for use by the public for the passage of vehicles. R.S.O. 1970, c. 186, s. 21 (1), *revised*.

Fire-arms in
power-boats
R.S.C. 1970,
c. M-12

- (2) Except as otherwise provided in the *Migratory Birds Convention Act* (Canada) or the regulations made under that Act, no person shall have a loaded fire-arm in or on or discharge the same from a power-boat. R.S.O. 1970, c. 186, s. 21 (2).

Hunting from
a stationary
vehicle or
power-boat

- (3) Notwithstanding clause (1) (a) and subsection (2), if the Minister is satisfied that the holder of licence to hunt is incapable of walking and is thereby required to use a wheelchair or other similar means of locomotion, he may in writing authorize that person to have a loaded fire-arm in or on, and to discharge a loaded fire-arm from, a vehicle or power-boat that is not in motion. 1980, c. 47, s. 7.

Interpre-
tation

- (4) A fire-arm having an unfired shell or cartridge in the chamber or in a magazine attached to the fire-arm shall be deemed to be loaded within the meaning of this section. R.S.O. 1970, c. 186, s. 21 (3).

Prohibition
as to guns

- 22.—**(1) In a locality that game usually inhabits or in which game is usually found, no person shall have a fire-arm in his possession, unless it is unloaded and encased, between one-half after sunset and one-half hour before sunrise of any day.

Night hunting

- (2) No person shall hunt any animal or bird between one-half hour after sunset and one-half hour before sunrise of any day.

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(3) No person shall use, while hunting, any device capable of throwing or casting rays of light on any object. R.S.O. 1970, c. 186, s. 23.

Devices capable of throwing or casting rays of light

23. Subject to section 21 and notwithstanding section 22, the holder of a licence to hunt raccoon at night may possess or use a fire-arm of a calibre or type prescribed in the regulations and a light for the purpose of hunting raccoon during the open season therefor when accompanied by a dog licensed therefor, provided that no person, while so hunting, shall use a light that is attached to a vehicle or is shone from or in a vehicle. 1980, c. 47, s. 8.

Exception, raccoon hunting

24.—(1) In this section, “chase” includes pursuing, following after and searching for but does not include taking or capturing, shooting at or shooting.

Interpretation

(2) The holder of a licence to chase raccoon at night may chase raccoon at night during such times and upon such terms and conditions as are prescribed in the regulations.

Licence to chase raccoon

(3) The holder of a licence to chase fox, coyote or wolf may chase fox, coyote or wolf, as the case may be, during the day or night at such times and upon such terms and conditions as are prescribed in the regulations. 1980, c. 47, s. 9, *part*.

Licence to chase fox, etc.

25. No person shall hunt any animal or bird with a repeating, automatic or auto-leading shot-gun that has not been permanently plugged or altered so that it is incapable of holding a total of more than three shells at one time in the chamber and magazine. R.S.O. 1970, c. 186, s. 25.

Automatic shot-guns

26.—(1) Except as provided in the regulations, no person shall hunt, trap or possess, or attempt to trap, any animal or bird in a provincial park or in a Crown game preserve.

Hunting, etc., in provincial parks

(2) Except as provided in the regulations, no person shall possess in a provincial park or in a Crown game preserve any trap, explosive, gun or sporting implement. R.S.O. 1970, c. 186, s. 26.

Weapons in provincial parks

27. Except as provided in the regulations, no person shall take or kill or attempt to take or kill any animal by means of poison. R.S.O. 1970, c. 186, s. 27.

Poison prohibited

28. Except as provided in the regulations, no person shall use a ferret in hunting game animals. R.S.O. 1970, c. 186, s. 28.

Ferrets

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- Set-guns **29.** No person shall use a set-gun in hunting game.
R.S.O. 1970, c. 186, s. 29.
- Interpre- **30.**—(1) In this section, “animal” includes any domestic,
tation fur-bearing or game animal.
- Prohibition (2) No person shall trap or attempt to trap any animal by
means of a body-gripping trap or leg-hold trap.
- Exceptions (3) Subsection (2) does not apply,
- (a) to a person who holds a licence to hunt or trap fur-bearing animals;
 - (b) to a farmer who uses a body-gripping trap or leg-hold trap on his own lands in defence or preservation of his property or in circumstances referred to in subsection 62 (7);
 - (c) to a person who uses a body-gripping trap or leg-hold trap designated by the Minister as a humane trap.
- Minister may (4) The Minister may, with the approval of the Lieutenant
make order Governor in Council, make an order designating areas or municipalities in Ontario in which the prohibition set out in subsection (2) does not apply.
- Idem (5) The Minister may, with the approval off the Lieutenant Governor in Council, make an order designating any body-gripping trap or leg-hold as a humane trap for the purpose of clause (3) (c). 1980, c. 47, s. 9, *part*.
- Flesh not to **31.** No person who has taken or killed an animal, bird or
be wasted fish suitable for food shall allow the flesh to be destroyed or spoiled. R.S.O. 1970, c. 186, s. 30.
- Release of **32.**—(1) Without the written authority of the Minister, no
imported person shall release any animal or bird imported into Ontario
stock or propagated from stock imported into Ontario.
- Control of (2) No person shall permit any animal or bird imported into
imported Ontario or propagated from stock imported into Ontario to
stock escape. R.S.O. 1970, c. 186, s. 31.
- Importation **33.** Nothing in this Act prevents the bringing of game into
of game Ontario from a place outside Ontario or the possession in Ontario of game taken outside Ontario if the game was legally take. R.S.O. 1970, c. 186, s. 32.

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34. Except with the written authority of the Minister, no construction camp, lumber camp, mining camp, hotel, restaurant, boarding-house or other commercial premises shall mention on a bill of fare or serve any game, other than game that has been propagated or sold under a licence. R.S.O. 1970, c. 186, s. 33.

Hotels,
restaurants,
etc.

35. Any person who knowingly makes any false statement in any application, statement under oath, report or return required by this Act or the regulations is, in addition to any other penalty for which he may be liable, guilty of an offence against this Act. R.S.O. 1970, c. 186, s. 34.

Offence to
make false
statement

LICENCES

36. Except under the authority of a licence, no person shall hunt or trap or attempt to trap animals or birds. R.S.O. 1970, c. 186, s. 35.

Licences

37.—(1) No person shall contravene the terms or conditions of his licence.

Contraven-
tion of
terms, etc.

(2) Except as provided in the regulations, no licence shall be transferred and no person shall buy, sell, exchange or in any way be a party to the transfer of a licence, coupon or seal, or in any way use or attempt to use a licence, coupon or seal issued to any other person. R.S.O. 1970, c. 186, s. 36 (1, 2).

Transfer of
licence,
coupon or
seal

(3) Any person who applies in accordance with this Act and the regulations for,

Issue of
certain
licences

(a) an angling licence;

(b) a licence to hunt game; or

(c) a licence referred to in section 79,

and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence. 1973, c. 108, s. 4 (1).

(4) The Minister may direct the refund of the fee paid for any licence where, owing to the licence not having been used by reason of sickness, accident or death, he considers it just, and the Treasurer of Ontario, upon the written request of the Minister, shall cause the refund to be made.

Refund of
fees

(5) The Minister may cancel any licence where an error has been made from any cause when issuing it, and the holder has

Cancellation
of licence in
event of
error

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no claim for indemnity or compensation with respect to it other than the adjustment or refund of any fee collected.

Licence to be carried

(6) Except as provided in the regulations, no holder of a licence shall hunt game unless at that time he has the licence on his person.

Production of licence on demand

(7) The holder of a licence shall produce and show it to any officer whenever requested by the officer. R.S.O. 1970, c. 186, s. 36 (4-7).

Wearing of badge

(8) The holder of a licence of a class designated in the regulations shall, while hunting in such parts of Ontario as are prescribed in the regulations, wear in a conspicuous place on his person a badge furnished by the Ministry clearly showing the number of the licence. 1980, c. 47, s. 10.

Licence obtained by misrepresentation

(9) The holder of a licence obtained by any false or misleading statement made in respect of any information required for the issue of the licence shall be deemed to be the holder of a void licence and the holder may be prosecuted under this Act in the same manner and with the same effect as he could be prosecuted if he were not the holder of a licence. R.S.O. 1970, c. 186, s. 36 (9).

Game and Fish Hearing Board

38.—(1) The Game and Fish Hearing Board is continued and shall be composed of not more than five members who shall be appointed by the Lieutenant Governor in Council, who shall hold office during pleasure and none of whom shall be members of the public service in the employ of the Ministry.

Chairman

(2) The Lieutenant Governor in Council may appoint one of the members of the Board as chairman.

Quorum

(3) Three members of the Board constitute a quorum.

Remuneration

(4) The members of the Board shall be paid such remuneration and expenses as the Lieutenant Governor in Council from time to time determines. 1973, c. 108, s. 5, *part*.

Interpretation

39.—(1) In this section and in sections 40 and 41, “licence” means a licence other than a licence referred to in subsection 37(3).

Refusal of licence

(2) An issuer of licences may refuse to issue a licence where the refusal is reasonably necessary for the achievement of the purpose of this Act.

Sec. 41 (7)

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(3) Where an issuer of licences refuses to issue a licence he shall serve notice of the refusal on the applicant for the licence. 1973, c. 108, s. 5, *part*.

Notice of refusal

40.—(1) The Minister may cancel a licence where the continued existence of the licence is not in accordance with the purpose of this Act.

Power of Minister

(2) Where the Minister proposes to cancel a licence under this Act, he shall serve or cause to be served notice of his proposal, together with written reasons therefor, on the holder of the licence. 1973, c. 108, s. 5, *part*.

Notice of proposal to cancel licence

(3) The Minister may direct the refund, in whole or in part, of the fee paid for any licence that has been cancelled under this Act. 1980, c. 47, s. 11.

Refund of fees

41.—(1) A notice under section 39 or 40 shall inform the applicant or holder of the licence that he is entitled to a hearing by the Board if he mails or delivers to the Minister and to the Board, within fifteen days after the notice under section 39 or 40 is served on him, notice in writing requiring a hearing by the Board, and he may so require such a hearing.

Notice requiring hearing

(2) Where an applicant or holder of the licence requires a hearing by the Board in accordance with subsection (1), the Board shall appoint a time for and hold the hearing and shall report thereon to the Minister.

Holding of hearing

(3) The report of the Board shall contain a summary of the facts presented at the hearing and its opinion on the merits of the issuing or cancellation of the licence, as the case may be, in light of the facts and in view of the purpose of this Act, together with its reasons for its opinion.

Report

(4) The Minister, after receiving and considering the report of the Board, may direct or refuse to direct the issuance of the licence or may carry out or refrain from carrying out his proposal to cancel the licence, as the case may be.

Powers of Minister

(5) The applicant or holder of the licence who has required the hearing and such other persons as the Board may specify are parties to the hearing.

Parties

(6) The Minister is entitled to be heard, by counsel or otherwise, upon a hearing under this section.

Minister entitled to be heard

(7) Sections 6 to 16 and 21 to 23 of the *Statutory Powers Procedure Act* apply with respect to a hearing under this section.

Application of
R.S.O. 1980,
c. 484

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Extension of
time for
requiring
hearing

(8) The Board may extend the time for the giving of notice requiring a hearing by an applicant or holder of the licence under this section either before or after expiration of such time where it is satisfied that there are *prima facie* grounds for granting relief to the applicant or holder of the licence and that there are reasonable grounds for applying for the extension and the Board may give such directions as it considers proper consequent upon the extension.

Examination
of
documentary
evidence

(9) An applicant or holder of the licence who is a party to a hearing under this section shall be afforded an opportunity to examine before the hearing any written or documentary evidence that will be produced, or any report the contents of which will be given in evidence at the hearing.

Notice of
hearing

(10) Notice of a hearing under this section shall afford to the holder of the licence a reasonable opportunity to show or to achieve compliance before the hearing with all lawful requirements for the retention of the licence.

Service of
notice

(11) Any notice required by section 39 or 40 to be served may be served personally or by registered mail addressed to the person upon whom notice is to be served at his latest known address, and where notice is served by registered mail it shall be deemed to be served on the fifth day after the day of mailing unless the person on whom notice is to be served establishes that he did not, acting in good faith, through absence, accident, illness or other cause beyond his control receive the notice until a later date. 1973, c. 108, s. 5, *part*.

Minors

42. Except as provided in the regulations, no licence shall be issued to any person under the age of sixteen years. R.S.O. 1970, c. 186, s. 37.

Issuers of
licences

43.—(1) No person shall issue any licence or collect any fee in respect thereof unless authorized by the Minister.

Idem

(2) The Minister may authorize any person to issue licences, and such issuers of licences shall have the powers and duties prescribed by the manual of licence-issuing instructions authorized by the Minister.

Licence
issuers as
trustees

(3) Every issuer of licences shall be deemed to be a trustee of the Crown of the licence fees collected by him or on his behalf.

Duties, etc.,
of licensees

(4) Every issuer of licences shall comply with the manual of licence-issuing instructions, and, if he fails so to do, he is guilty of an offence against this Act.

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(5) No person shall possess a licence that does not exhibit the name of the holder or that is ante-dated or undated or a material part of which is not completed. R.S.O. 1970, c. 186, s. 38.

Licence in blank

44.—(1) Subject to subsection (5), the Minister may in writing authorize any municipality to pass by-laws for issuing and fixing the maximum number of licences to hunt, during the open season, pheasants, rabbits and foxes and for charging such fees therefor as he authorizes, and the Minister may fix the minimum number of such licences that the by-laws shall provide for. 1973, c. 108, s. 6 (1).

Municipal licences to hunt pheasants, etc.

(2) Where a municipality has passed a by-law under subsection (1), no person shall hunt pheasants, rabbits or foxes in the municipality during the open season without a licence from the municipality.

Where municipal licence required

(3) Where a municipality has passed a by-law under subsection (1), the Minister may in writing authorize the municipality to pass a further by-law to provide that a licence to hunt animals and birds not protected by this Act or the regulations or the *Migratory Birds Convention Act* (Canada) or the regulations made under that Act, during the period between the 1st day of March and the 31st day of August, is not valid in that municipality unless it is signed by the clerk of the municipality or by a person authorized by him.

Validity of licence

R.S.C. 1970, c. M-12

(4) The Minister may in writing authorize the repeal of a by-law passed under subsection (1), and the repealing by-law may provide for the refund, in whole or in part, of licence fees paid for licences issued under the repealed by-laws. R.S.O. 1970, c. 186, s. 39 (2-4).

Repeal of by-laws

(5) The Minister may in his written authority referred to in subsection (1) exempt from the operation of subsection (1) any land of the Crown situate within the municipality or any land within the municipality, the owner of which has entered into an agreement under section 6, respecting such land. 1973, c. 108, s. 6 (2).

Minister may limit his authority territorially

45.—(1) In this section, “guide” means a person who for reward carries out the customary duties of a hunting or angling guide.

Interpretation

(2) Except under the authority of a licence, no person shall act as a guide in any part of Ontario designated in the regulations.

Guides

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Employment
of guides

(3) In any part of Ontario designated as an area in which no person shall act as a guide under the authority of a licence, no person shall employ as a guide a person who is not the holder of a guide's licence.

Limitation of
guides

(4) The holder of a guide's licence shall not act as a guide for any person for any purpose for which that person is required to have a licence under this Act or the Ontario Fishery Regulations unless that person is the holder of a licence for the purpose. R.S.O. 1970, c. 186, s. 40 (1-4).

Guides for
non-resident
hunters

(5) No non-resident shall hunt deer, elk or moose in any part of Ontario designated in the regulations without employing or being accompanied by a licensed guide, but, where two or more non-residents hunt together, the number of guides employed need not be more than one guide for each two non-residents. R.S.O. 1970, c. 186, s. 40 (5); 1980, c. 47, s. 12.

ILLEGAL POSSESSION OF GAME

Possession of
game

46. No person shall knowingly possess any game hunted in contravention of this Act or the regulations. R.S.O. 1970, c. 186, s. 41.

GAME ANIMALS

Open seasons

47.—(1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk or moose. R.S.O. 1970, c. 186, s. 42 (1); 1980, c. 47, s. 13 (1).

Multiplicity
of licences

(2) Except as provided in the regulations, no person shall be the holder of more than one licence to hunt caribou, deer, elk or moose in any year. R.S.O. 1970, c. 186, s. 42 (2); 1980, c. 47, s. 13 (2).

Traps, nets,
snares, etc.,
prohibited

48.—(1) No person shall take or kill a black bear, polar bear, caribou, deer, elk or moose by means of a trap, net, baited line or other similar contrivance or set any of them for any such animal. R.S.O. 1970, c. 186, s. 44 (1); 1980, c. 47, s. 14.

Exception

(2) Notwithstanding subsection (1), black bear may be trapped during such times and subject to such terms and conditions as are prescribed in the regulations. R.S.O. 1970, c. 186, s. 44 (2).

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49. No person shall hunt a caribou, deer, elk or moose while it is swimming. R.S.O. 1970, c. 186, s. 45; 1980, c. 47, s. 15.

Swimming
caribou,
deer, elk or
moose

50. Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as the Minister prescribes, no person shall hunt or trap or attempt to trap any rabbit or any black, grey or fox squirrel. R.S.O. 1970, c. 186, s. 46.

Hunting,
trapping, etc.

51.—(1) Except under the authority of a licence and subject to the regulations, no person shall sell, offer for sale, purchase or barter, or be concerned in the sale, purchase or barter of a game animal or possess a game animal for sale. R.S.O. 1970, c. 186, s. 47 (1).

Licence for
sale of game
animal

(2) Except under the authority of a licence and subject to the regulations, no person shall propagate a game animal or possess a game animal for propagation. 1980, c. 47, s. 16.

Licence to
propagate
game animal

52. Except with the written authority of the Minister and subject to such terms and conditions as he may impose, no person shall take a game animal by any means for educational or scientific purposes. 1980, c. 47, s. 17.

Taking of
game animal

53. Notwithstanding anything in this Act, any person may under the authority of a licence sell the meat of a bear if taken lawfully, and any person may without a licence possess or buy any bear meat for his own use. R.S.O. 1970, c. 186, s. 49.

Dealing in
bear meat

GAME BIRDS

54. Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt ruffed grouse, spruce grouse, Hungarian partridge, pheasant, sharp-tailed grouse, greater prairie-chicken, ptarmigan, bob-white quail or wild turkey. R.S.O. 1970, c. 186, s. 50.

Grouse,
partridge,
etc.

55. No person shall hunt any game bird during the closed season or any other bird at any time, except crows, cowbirds, blackbirds, starlings, house-sparrows and birds, other than pheasants or Hungarian partridge, released under section 32. R.S.O. 1970, c. 186, s. 51.

Hunting birds

56. No person shall use, set or maintain a net, trap, spring, cage or similar contrivance for the purpose of taking or killing any game bird. R.S.O. 1970, c. 186, s. 52.

Traps and
snares
prohibited

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- Use of rifle to hunt pheasant prohibited **57.** No person shall hunt pheasant with a rifle. R.S.O. 1970, c. 186, s. 53.
- Licence for propagation, etc., of game birds **58.** Except under the authority of a licence and subject to the regulations, no person shall propagate or sell a game bird or possess a game bird for propagation or sale. R.S.O. 1970, c. 186, s. 54.
- Game bird hunting preserves **59.**—(1) Except under the authority of a licence and subject to the regulations, no person shall own or operate a game bird hunting preserve.
- Exception (2) Subsection (1) does not apply to a person or a game bird hunting preserve exempted under the regulations. R.S.O. 1970, c. 186, s. 55.
- Birds protected **60.**—(1) Except with the written authority of the Minister and subject to such terms and conditions as he may impose, no person shall take a game bird by any means for educational or scientific purposes.
- Eggs and nests protected (2) No person shall take, destroy or possess the eggs or nests of any game bird, except with the written authority of the Minister to take, destroy or possess the eggs or nests for educational or scientific purposes. 1980, c. 47, s. 18.

FUR-BEARING ANIMALS

- Hunting, trapping etc. **61.** Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as the Minister prescribes, no person shall hunt or trap or attempt to trap any fur-bearing animal. R.S.O. 1970, c. 186, s. 57.
- Licence to trap **62.**—(1) The Minister may, in a licence to hunt or trap fur-bearing animals,
- (a) fix the number of each species of fur-bearing animal that may be taken thereunder; and
 - (b) designate the area in which fur-bearing animals may be taken thereunder by the holder of the licence.
- Idem (2) The Minister may limit the number of licences to hunt or trap fur-bearing animals in any area.
- Non-residents (3) No non-resident shall be the holder of a licence to hunt or trap fur-bearing animals. R.S.O. 1970, c. 186, s. 58 (1-3).

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(4) Notwithstanding anything in this Act, no person shall sell, offer for sale, purchase or barter a live fur-bearing animal or live wolf, except with the written authority of the Minister and subject to the regulations.

Sale of fur-bearing animals restricted

(5) The holder of a licence to hunt or trap fur-bearing animals may sell the carcass or any part thereof, including the pelt, of any fur-bearing animal taken by him under that licence. 1980, c. 47, s. 19 (1).

Authority to sell

(6) Subject to sections 26 and 44, the holder of a licence to hunt or trap fur-bearing animals may, under the authority of that licence and without any other licence, hunt, in the area described in the licence during the open seasons between the 15th day of October and the 30th day of June in the year next following, any bird or animal, other than caribou, deer, elk or moose. R.S.O. 1970, c. 186, s. 58 (5); 1980, c. 47, s. 19 (2).

Exceptions as to trappers

(7) A farmer or any member of his family residing with him upon his lands may, without a licence, hunt or trap thereon fur-bearing animals during the open season and may hunt thereon birds or animals, other than caribou, deer, elk or moose, during the open seasons.

Exceptions as to farmer

(8) Except under the authority of a licence and subject to this Act and the regulations, no farmer and no member of his family residing with him upon his lands shall sell the carcass or any part thereof, including the pelt, of any fur-bearing animal taken by him under the provisions of subsection (7). 1980, c. 47, s. 19 (3).

Authority to sell limited

63. No person shall touch or interfere with any set trap, unless authorized so to do by law or by the owner thereof. R.S.O. 1970, c. 186, s. 59.

Interference with traps

64. Except as provided in the regulations, no person shall during the closed season have in his possession or in that of his servant or agent, or in that of any other person on his behalf, any fur-bearing animal wherever killed,

Possession of fur-bearing animals in closed season

- (a) except that a pelt of an animal killed in Ontario may be possessed during the closed season under a licence if applied for within ten days after the end of the open season in which it was killed, but this clause does not apply to the pelt of a fur-bearing animal that has been sealed or marked in accordance with this Act; and
- (b) except that a pelt of an animal killed outside Ontario may be possessed during the closed season

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under a licence if applied for within forty-eight hours after the pelt is received. R.S.O. 1970, c. 186, s. 61; 1971, c. 30, s. 3; 1980, c. 47, s. 21.

Licences: **65.**—(1) Except under the authority of a licence, no person shall,

fur tanner's (a) engage in or carry on, or be concerned in, the tanning, plucking or treating of pelts;

fur dealer's (b) engage in or carry on, or be concerned in, the trading, buying or selling of pelts; or

possession of pelts (c) possess any pelt. R.S.O. 1970, c. 186, s. 62 (1); 1980, c. 47, s. 22.

Trade only between licensed fur dealers (2) No holder of a licence under clause (1) (b) shall sell, trade or barter, or be concerned in the selling, trading or bartering, of pelts to or with any other person in Ontario, except where that other person holds a licence under clause (1) (b). R.S.O. 1970, c. 186, s. 62 (2).

Sealing or marking of pelts **66.**—(1) The pelt of any fur-bearing animal, other than a muskrat, shall be sealed or marked by a duly authorized person before sale, and no person licensed under clause 65 (1) (b) or (c) shall have the unsealed or unmarked pelt of any fur-bearing animal, other than a muskrat, in his possession.

Offence (2) No person shall present or permit to be presented for sealing or marking the pelt of any fur-bearing animal required to be sealed under subsection (1) that was not taken by him under the authority of his licence to hunt or trap fur-bearing animals or under subsection 62 (7).

Idem (3) No person shall be party to having or attempting to have sealed or marked the pelt of any fur-bearing animal that was not taken under the authority of the licence that is presented with the pelt. 1980, c. 47, s. 23.

Hunting and trapping of fur-bearing animals restricted **67.** Except with the written authority of the Minister and subject to such terms and conditions as he may impose, no person shall hunt or trap or attempt to trap a fur-bearing animal in the wild state for,

R.S.O. 1980, c. 181 (a) the purpose of transfer to a fur farm as defined in the *Fur Farms Act*; or

(b) educational or scientific purposes. 1980, c. 47, s. 24.

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68. Subject to section 2 and except under the authority of a licence to hunt or trap fur-bearing animals, no person shall molest, damage or destroy. Dens of fur-bearing animals

(a) a den or usual place of habitation of a fur-bearing animal, other than that of a fox or skunk; or

(b) a beaver dam. R.S.O. 1970, c. 186, s. 65.

69.—(1) No person shall take or ship or attempt to take or ship to a point outside Ontario any fur-bearing animal or its pelt without a licence and without paying the royalty prescribed in the regulations. R.S.O. 1970, c. 186, s. 66 (1). Royalties payable

(2) No person shall take or ship or attempt to take or ship to a fur farm as defined in *Fur Farms Act* any fur-bearing animal taken under section 67 without paying the royalty prescribed by the regulations. 1971, c. 30, s. 7. Idem

(3) No person shall send or have sent any fur-bearing animal or its pelt to a tanner or taxidermist to be tanned, plucked or treated in any way without a licence and without paying the royalty prescribed in the regulations. R.S.O. 1970, c. 186, s. 66 (2). Idem

70. No person who has taken or killed a fur-bearing animal shall allow the pelt to be destroyed or spoiled. R.S.O. 1970, c. 186, s. 67. Pelts not to be destroyed

71. Notwithstanding anything in this Act, any person may under the authority of a licence sell the meat of a beaver, muskrat or raccoon if taken lawfully, and any person may without a licence possess or buy any such meat for his own use. R.S.O. 1970, c. 186, s. 68. Dealing in muskrat, etc.

FISH

72.—(1) No person shall sell, offer for sale, purchase or barter, or be concerned in the sale, purchase or barter, of an Atlantic salmon (also known as ouananiche) taken from Ontario waters, a smallmouth bass, largemouth bass, maskinonge, brook trout, brown trout, rainbow trout or Aurora trout, or any part thereof, including the eggs thereof, but subject to such terms and conditions as are prescribed by the regulations, No traffic in certain fish

(a) under the authority of a licence to propagate and sell bass and trout, a sale may be made of smallmouth bass, largemouth bass, brook trout or rainbow trout propagated in Ontario for the purpose of

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stocking and of brook trout and rainbow trout for human consumption; and

(b) under the authority of a licence to sell trout, a sale may be made for human consumption of,

(i) brook trout and rainbow trout taken from waters outside Ontario,

(ii) live brook trout and rainbow trout propagated in Ontario and offered for sale in a restaurant or a retail shop, or

(iii) surplus stocks of brook trout and rainbow trout held under a fishing preserve licence. 1973, c. 108, s. 8; 1980, c. 47, s. 25 (1).

Idem

(2) No person shall sell, offer for sale, purchase or barter, or be concerned in the sale, purchase or barter, of yellow pickerel (also known as pike-perch, walleye, dore or blue pickerel) pike, lake trout, sturgeon or sauger, or any part thereof, taken from Ontario waters by angling or taken in any other manner by a person who is not the holder of a commercial fishing licence. 1980, c. 47, s. 25 (2).

Idem

(3) No person shall buy, sell or possess a fish or part of a fish, including the eggs thereof, taken from Ontario waters during the closed season for that fish. R.S.O. 1970, c. 186, s. 69 (3); 1980, c. 47, s. 25 (3).

Fishing
preserves

73.—(1) Except under the authority of a licence and subject to the regulations, no person shall own or operate a fishing preserve.

Exception

(2) Subsection (1) does not apply to a person or a fishing preserve exempted under the regulations. R.S.O. 1970, c. 186, s. 70.

Fish nets,
possession

74.—(1) Except under the authority of a licence, no person shall possess a gill, hoop, pound, seine, trap or trawl net.

Idem

(2) No person shall sell a gill, hoop, pound, seine, trap or trawl net to any person not the holder of a commercial fishing licence or a licence under subsection (1). R.S.O. 1970, c. 186, s. 71.

Exception

(3) Subsection (1) does not apply to a manufacturer, merchant or common carrier that possesses any net referred to in subsection (1) for the purpose of sale or transportation. 1980, c. 47, s. 26.

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75. The ownership of the bed of a navigable water or of a lake or river does not include the exclusive right of fishing in the water that covers or flows over the bed unless that exclusive right is expressly granted by the Crown. R.S.O. 1970, c. 186, s. 72. Right to fish

AMPHIBIANS AND REPTILES

76. Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt or attempt to hunt or possess any amphibian or reptile. 1980, c. 47, s. 27, *part.* Hunting of amphibians and reptiles

77. Except under the authority of a licence and subject to the regulations, no person shall sell, offer for sale, purchase or barter, or be concerned in the sale, purchase or barter, of any amphibian or reptile, or possess an amphibian or reptile for sale. 1980, c. 47, s. 27, *part.* Sale of amphibians and reptiles

78. Except with the written authority of the Minister and subject to such terms and conditions as he may impose, no person shall take an amphibian or reptile by any means for educational or scientific purposes. 1980, c. 47, s. 27, *part.* Hunting of amphibians and reptiles for educational or scientific purposes

DOGS

79. Except under the authority of a licence issued for the dog, no person shall use or be accompanied by a dog while hunting caribou, deer, elk, or moose. R.S.O. 1970, c. 186, s. 76; 1980, c. 47, s. 28 Use of dogs in hunting deer, etc.

80.—(1) No person owning, claiming to own or harbouring a dog shall allow it to run at large during the closed season for deer, elk, moose or bear in a locality that deer, elk, moose or bear usually inhabit or in which they or any of them are usually found, and a dog found running deer, elk, moose or bear during the closed season for deer, elk, moose or bear in such a locality may be killed on sight by an officer without incurring any liability or penalty therefor. Dogs running at large, etc.

(2) No person shall use or be accompanied by a dog while hunting deer, elk, moose or bear in a part of Ontario that is designated in the regulations, and a dog found running at large in such a designated part of Ontario may be killed on sight by an officer without incurring any liability or penalty therefor. 1980, c. 47, s. 29. Use of dogs in hunting deer, etc., prohibited in designated areas

81.—(1) In this section,

Interpre-
tation

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- (a) “field trial” means an activity, the objective of which is to test the hunting skills of a dog;
- (b) “training” means the process of teaching a dog,
 - (i) hunting skills, or
 - (ii) such skills as are necessary for participation in a field trial.

Field trials
and training
restricted

(2) Except with the written authority of the Minister and subject to such terms and conditions as he may impose, no person shall conduct,

- (a) a field trial; or
- (b) training,

that involves a game animal or a game bird during any closed season therefor. 1980, c. 47, s. 30.

LIVE GAME AND WOLVES

Live game
kept in
captivity

82.—(1) Except under the authority of a licence issued on such terms and conditions as are prescribed in the regulations, no person shall keep live game or a wolf in captivity for more than ten days.

Seizure of
animals,
cages, etc.

(2) Live game or a wolf kept in captivity contrary to this section and any cage, pen, crate, shelter or other enclosure used in connection therewith shall be seized, and, upon conviction of the person in possession or control thereof, becomes the property of the Crown in right of Ontario and may be disposed of by the Minister. R.S.O. 1970, c. 186, s. 79 (1, 2).

Application
of section

(3) This section does not apply where live game or a wolf is kept in captivity in a zoo operated by a municipality or for scientific or educational purposes in a public institution. 1973, c. 108, s. 9.

TRANSPORTATION AND EXPORT

Export of
game by
non-residents
R.S.C. 1970,
c. M-12

83.—(1) No non-resident entitled to hunt under a licence shall export more game than the number he is authorized to possess by this Act or the regulations or the *Migratory Birds Convention Act* (Canada) or the regulations made under that Act.

Transport of
fish or game
illegally
taken

(2) No person shall ship or transport or cause to be shipped or transported, or receive or possess for shipment or trans-

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port, fish or game caught, taken or killed in Ontario during the closed season.

(3) The Minister may issue a permit not inconsistent with any law of Canada to export from Ontario or to transport in Ontario at any time any game, whether dead or alive, upon proof under oath satisfactory to him that the game has been lawfully taken.

Transport of
game under
permit

(4) The Minister may issue to a non-resident entitled to hunt under a licence a permit not inconsistent with any law of Canada to export from Ontario or to transport in Ontario at any time any animal or bird killed by him under the licence upon proof satisfactory to the Minister that the animal or bird has been lawfully taken and upon payment of the fee prescribed in the regulations and any such permit shall be deemed to be a permit mentioned in subsection (3). R.S.O. 1970, c. 186, s. 80.

Game export
permits

84. No person shall ship or transport or cause to be shipped or transported, or receive or possess for shipment or transport; a receptacle containing game or fish that is not plainly marked on the outside in such a manner as to give a description of the contents and the name and address of the consignee and of the consignor. R.S.O. 1970, c. 186, s. 81.

Receptacles
to be marked

PROCEDURE

85. A contravention of this Act or the regulations or of the terms and conditions of a licence is an offence against this Act. R.S.O. 1970, c. 186, s. 82.

Offence

86. Where in a prosecution under this Act it appears in evidence that more than one offence of the same kind was committed at the same time or on the same day, the court shall in one conviction impose all the penalties at the same time. R.S.O. 1970, c. 186, s. 84.

Similar
offence on
the same day

87. Except where otherwise provided, the *Provincial Offences Act* applies to all prosecutions under this Act. R.S.O. 1970, c. 186, s. 85.

Procedure
R.S.O. 1980,
c. 400

88.—(1) The Minister may authorize any officer to collect a money payment as security for appearance in court from any person against whom the officer is about to commence proceedings for an offence against this Act.

Money
payment as
security for
appearance
in court

(2) Where a money payment has been collected under subsection (1) and the person charged does not appear in court, he may be tried *in absentia* and, upon conviction, whether or

Disposition
of money
payments

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Sec. 88 (2)

not he has appeared in court, the money payment shall be applied to the payment of any fine imposed and the costs, and the balance, if any, shall be remitted to the person convicted, and, where no conviction is made, the money payment shall be remitted to the person who made it. R.S.O. 1970, c. 186, s. 86.

Cancellation
and revival
of licences
after
conviction

89.—(1) Upon the conviction of any person of an offence against this Act or the Ontario Fishery Regulations, any licence, except a licence to hunt, other than a licence to hunt or trap fur-bearing animals, which is held by him and which is related to the offence, shall be deemed to be cancelled without further action or notice, but the Minister may revive the licence upon such terms and conditions as he considers proper.

Cancellation
and pro-
hibition
against issue
of licence
R.S.O. 1980,
c. 173
R.S.C. 1970,
cc. M-12, C-
34

(2) Upon the conviction of any person of an offence against this Act or under the *Forest Fires Prevention Act*, the *Migratory Birds Convention Act* (Canada) or the regulations made under that Act, or under section 176, 202, 203, 204, 387, 388, 389, 390, 392, 398, 399, 400, 401 or 402 of the *Criminal Code* (Canada) as amended or re-enacted from time to time, committed while using or in possession of a fire-arm for the purpose of hunting, the court may cancel any licence to hunt, except a licence to hunt or trap fur-bearing animals, issued to such person, and, upon such conviction, the court may order that such person shall not apply for or procure any licence to hunt, except a licence to hunt or trap fur-bearing animals, during the period stated in the order.

Idem

(3) Upon the conviction of a holder of a licence mentioned in subsection 82 (1) of an offence against section 401 or 402 of the *Criminal Code* (Canada) committed in respect of live game or a wolf held under the licence, the court may cancel the licence.

Idem

(4) Upon conviction of any person of an offence against section 19, the court, in addition to making an order under subsection (2), may order that the convicted person shall not apply for or procure a licence to hunt, except upon the successful completion of an examination for applicants for licences.

Offence

(5) Every person who fails to comply with an order made against him under subsection (2) or (3) is guilty of an offence against this Act. R.S.O. 1970, c. 186, s. 88.

Evidence

90. In prosecutions under this Act, in respect of,

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GAME AND FISH

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- (a) taking, killing, procuring or possessing game or fish, or any part thereof, the onus is upon the person charged to prove that the game or fish or part thereof was lawfully taken, killed, procured or possessed by him;
- (b) hunting or trapping, the possession of a gun, decoy or other implement for hunting or trapping in or near a place that game inhabits or where game is usually found is *prima facie* proof that the person in possession of it was hunting or trapping, as the case may be; or
- (c) making of returns by a licensee or an issuer of licences, the production of a return is *prima facie* proof of the making of such return and the contents thereof. R.S.O. 1970, c. 186, s. 89.

91. Except where otherwise provided, every person who commits an offence against this Act is liable to a fine of not more than \$5,000. R.S.O. 1970, c. 186, s. 90; 1980, c. 47, s. 32.

General
penalty

92. The Lieutenant Governor in Council may make regulations,

Regulations
by Lt. Gov.
in Council

- 1. establishing classes for licences referred to in this Act or the regulations or the Ontario Fishery Regulations, governing the issue, form, renewal, transfer, refusal and cancellation of licences or any class of them, prescribing their duration, territorial limitations, terms and conditions and the fees payable therefor, and limiting the number of licences of any class that may be issued;
- 2. requiring and prescribing the issue, form, duration and terms and conditions of coupons or tags to be issued with any licence, and requiring the licensee to make such use thereof as is prescribed;
- 3. prescribing the calibre and type of fire-arms that may be used under section 23; R.S.O. 1970, c. 186, s. 91, pars. 1-3.
- 4. regulating, restricting or prohibiting the use of blinds and decoys; 1973, c. 108, s. 10 (1), *part.*
- 5. prescribing the fees payable for game export permits for any species of animal or bird;

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6. respecting the issue of licences to trap fur-bearing animals on Crown lands and dividing Ontario or any part thereof into trap-line areas and designating such areas by identifying numbers and initials;
7. providing for licensing persons to hunt in any provincial park in which hunting is permitted under paragraph 32 or on Crown lands in any part of Ontario designated under paragraph 33; R.S.O. 1970, c. 186, s. 91, pars. 4-6.
8. prescribing the fee to enter upon lands owned by the Crown that are used for the purpose of propagating or retaining game or fish; 1973, c. 108, s. 10 (1), *part*.
9. establishing or approving one or more systems for the use of designated railway lands for hunting or fishing as provided for in the exception mentioned in subsection 18 (10); 1980, c. 10, s. 2 (2).
10. prescribing the terms and conditions upon which licences may be issued to persons under sixteen years of age; R.S.O. 1970, c. 186, s. 91, par. 7.
11. designating classes of licences and prescribing parts of Ontario for the purposes of subsection 37 (8); 1980, c. 47, s. 33 (1).
12. declaring animals, other than those mentioned in paragraph 11 of section 1, to be fur-bearing animals; R.S.O. 1970, c. 186, s. 91, par. 9.
13. declaring a species of Amphibia to be an amphibian;
14. declaring a species of Reptilia to be a reptile; 1980, c. 47, s. 33 (2), *part*.
15. governing the sale of or traffic in any game, prescribing the fees payable for a seal, tag or other means of identification that is furnished by the Ministry to the holder of a licence to sell any such game, and requiring such holder to use such seal, tag or other means of identification in the manner prescribed; R.S.O. 1970, c. 186, s. 91, par. 10; 1972, c. 1, s. 1.
16. designating the species of game birds that may be propagated, sold or possessed for propagation or

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sale under a licence mentioned in section 58; R.S.O. 1970, c. 186, s. 91, par. 11.

17. designating the species of game animals that may be propagated or possessed for propagation under a licence mentioned in subsection 51 (2); 1980, c. 47, s. 33 (2), *part.*
18. authorizing and regulating the sale of game brought into Ontario and lawfully hunted or procured according to the law of the place in which it was hunted or procured; R.S.O. 1970, c. 186, s. 91, par. 12.
19. prescribing the number, age or sex of game animals or game birds that may be taken or possessed; 1978, c. 52, s. 2 (1).
20. prohibiting the taking or possession of game animals or game birds in excess of the number prescribed under paragraph 19 or 22;
21. prohibiting the taking or possession of any game animal or game bird other than a game animal or game bird of the age or sex prescribed under paragraph 19 or 22;
22. defining "hunting in a party", prescribing the number, age or sex of game animals or game birds that may be taken or possessed by members of a party, designating parts of Ontario where persons may hunt in a party and regulating or prohibiting hunting in a party in any area. 1978, c. 52, s. 2 (2).
23. prescribing the open season during which and the terms and conditions upon which black bear, polar bear, caribou, deer, elk or moose may be hunted; R.S.O. 1970, c. 186, s. 91, par. 14; 1980, c. 47, s. 33 (3).
24. prescribing the open season during which and the terms and conditions upon which ruffed grouse, spruce grouse, Hungarian partridge, pheasant, sharptailed grouse, greater prairie-chicken, ptarmigan, bob-white quail or wild turkey may be hunted; R.S.O. 1970, c. 186, s. 91, par. 15.
25. designating any parts of Ontario in which no person shall use or be accompanied by a dog while hunting

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deer, elk, moose or bear; R.S.O. 1970, c. 186, s. 91, par. 16; 1980, c. 47, s. 33 (4).

26. limiting the number of licences that may be issued to own or operate game bird hunting preserves, designating the species of game birds that may be possessed under such licence, prescribing minimum and maximum areas for preserves, requiring and regulating the posting of boundaries of preserves and the release of game on preserves, and regulating the spacing of preserves, the taking or killing of game on preserves and the use of preserves for hunting;
27. providing for the exemption from subsection 59 (1) and from the regulations or any provision thereof, of any person or class of persons or any game bird hunting preserve or class thereof, and prescribing the terms and conditions therefor;
28. limiting the number of licences that may be issued to own or operate fishing preserves, designating the species of fish that may be possessed under such a licence, prescribing minimum and maximum areas for preserves, requiring and regulating the posting of boundaries of preserves and the release of fish on preserves, and regulating the spacing of preserves, the taking or killing of fish on preserves and the use of preserves for fishing;
29. providing for the exemption from subsection 73 (1) and from the regulations or any provision thereof, of any person or class of persons, or any fishing preserve or class thereof, and prescribing the terms and conditions therefor;
30. designating parts of Ontario as Crown game preserves and providing for licensing persons to possess guns in Crown game preserves;
31. prohibiting and regulating entry on Crown game preserves on Crown land;
32. prescribing the conditions under which animals or birds may be hunted in provincial parks or Crown game preserves, providing for and regulating the possession or use of traps, explosives, guns or sporting implements in provincial parks or Crown game preserves, and prohibiting the use of motor-boats for trolling in provincial parks; R.S.O. 1970, c. 186, s. 91, pars. 17-23.

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33. designating Crown lands or lands in which the Crown has acquired an interest or in respect of which an agreement has been entered into under section 6 on which hunting may be regulated, limiting and regulating the number of hunters that may hunt at any time and the hours during which hunting may be carried on, and prescribing the fees that may be charged for the use of equipment and facilities supplied by the Ministry; R.S.O. 1970, c. 186, s. 91, par. 24; 1972, c. 1, s. 1.
34. designating parts of Ontario as "hinterland areas" and prohibiting persons, other than residents of the areas, from entering and travelling about therein for the purpose of fishing or hunting;
35. prescribing the terms and conditions upon which aircraft may be used while hunting; R.S.O. 1970, c. 186, s. 91, pars. 25, 26.
36. prescribing the terms and conditions upon which a person may use a ferret for hunting game animals.
37. prescribing the terms and conditions upon which a person may use poison for taking or killing any animal; R.S.O. 1970, c. 186, s. 91, pars. 28, 29.
38. regulating, restricting or prohibiting the possession or use of traps; 1980, c. 47, s. 33 (5).
39. regulating, restricting or prohibiting the possession or use of fire-arms for the purpose of hunting;
40. prescribing the times during which and the terms and conditions on which black bear may be trapped; R.S.O. 1970, c. 186, s. 91, pars. 31, 32.
41. providing for and establishing a program for the education of trappers, including the appointment of instructors; 1980, c. 47, s. 33 (6).
42. providing for and establishing a program to promote the safe handling of fire-arms by hunters;
43. providing for the appointment and for the examination of applicants for licences and prescribing fees for examinations; R.S.O. 1970, c. 186, s. 91, pars. 33, 34.

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44. governing the sale under subsection 72 (1) of small-mouth bass, largemouth bass, brook trout or rainbow trout, prescribing the fees payable for a seal, tag or other means of identification that is furnished by the Ministry to the holder of a licence to propagate and sell any such fish, and requiring such holder to use such seal, tag or other means of identification in the manner prescribed; R.S.O. 1970, c. 186, s. 91, par. 35; 1972, c. 1, s. 1.
45. prescribing the royalties payable in respect of fish or under section 69, and excepting any fish or fur-bearing animal therefrom; R.S.O. 1970, c. 186, s. 91, par. 36.
46. designating counties and regional municipalities for the purpose of subsection 21 (1); R.S.O. 1970, c. 186, s. 91, par. 37, *revised*.
47. prescribing the open seasons during which amphibians and reptiles may be taken, the number and size of amphibians and reptiles that may be taken or possessed and the methods whereby amphibians and reptiles may be taken and designating the parts of Ontario where amphibians and reptiles may be taken;
48. governing the sale, purchase and barter of amphibians and reptiles; 1980, c. 47, s. 33 (7).
49. permitting residents of any province extending a similar right to Ontario residents to be classed as Ontario residents for the purpose of any specified licence under this Act;
50. requiring any person to keep such records and make such reports and returns as are prescribed; R.S.O. 1970, c. 186, s. 91, pars. 39, 40.
51. designating parts of Ontario as wildlife management units;
52. limiting and regulating the number of hunters that may hunt at any time in a wildlife management unit and the hours during which hunting may be carried on in a wildlife management unit;
53. establishing a system for registering or reporting game taken or possessed;

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54. prescribing the time or times and the terms and conditions upon which raccoon may be chased under section 24;
55. prescribing the time or times and the terms and conditions upon which fox, coyote or wolf may be chased under section 24; 1980, c. 47, s. 33 (8).
56. respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act. R.S.O. 1970, c. 186, s. 91, par. 41.

93.—(1) The Minister may make regulations,

Regulations
by Minister

1. prescribing the open seasons during which and the terms and conditions upon which any fur-bearing animal may be hunted or trapped or the pelt of any of them may be possessed;
2. prescribing the open seasons during which and the terms and conditions upon which rabbits or black, grey or fox squirrels may be hunted or trapped;
3. setting apart waters for the conservation or propagation of frogs;
4. regulating or prohibiting the placing of huts on ice for the purpose of fishing and regulating their use and requiring and regulating their removal;
5. for the purposes of section 45 designating parts of Ontario as areas in which no person shall act as a guide except under the authority of a licence;
6. designating parts of Ontario as areas in which no non-resident shall hunt deer, elk or moose without employing or being accompanied by a licensed guide. R.S.O. 1970, c. 186, s. 92; 1980, c. 47, s. 34.

(2) Paragraph 4 of subsection (1) is repealed on a day to be named by proclamation of the Lieutenant Governor. 1973, c. 174, ss. 1, 2.

Repeal

94. Any regulations may be limited territorially or as to time or otherwise. R.S.O. 1970, c. 186, s. 93.

Regulations
may be
limited

INTERPRETATION ACT

R.S.C. 1970 , c. I-23

An Act Respecting the interpretation of statutes.

SHORT TITLE

1. This Act may be cited as the *Interpretation Act*, 1967-68, c. 7, s. 1.

INTERPRETATION

Definitions — Expired enactment.

2. (1) In this Act

“Act” means an Act of the Parliament of Canada;

“enact” includes to issue, make or establish;

“enactment” means an Act or regulation or any portion of an Act or regulation;

“public officer” includes any person in the public service of Canada

(a) who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or

(b) upon whom a duty is imposed by or under an enactment;

“regulation” includes an order, regulation, order in council, order prescribing regulations, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(a) in the execution of a power conferred by or under the authority of an Act, or

(b) by or under the authority of the Governor in Council;

“repeal” includes revoke or cancel.

(2) For the purposes of this Act, an enactment that has expired or lapsed or otherwise ceased to have effect shall be deemed to have been repealed.

APPLICATION

Application — Application to this Act — Rules of construction not excluded.

3. (1) Every provision of this Act extends and applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

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(2) The provisions of this Act apply to the interpretation of this Act.

(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable thereto and not inconsistent with this Act.

ENACTING CLAUSE OF ACTS

Enacting clause — Order of clauses.

4. (1) The enacting clause of an Act may be in the following form:

“Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:”.

(2) The enacting clause of an Act shall follow the preamble, if any, and the various provisions within the purview or body of the Act shall follow in a concise and enunciative form.

OPERATION

Royal Assent

Royal assent and date of commencement — Commencement provision — Commencement when no date fixed.

5. (1) The Clerk of the Parliaments shall endorse on every Act, immediately after the title thereof, the day, month and year when the Act was assented to in Her Majesty's name; such endorsement shall be taken to be a part of the Act, and the date of such assent shall be the date of the commencement of the Act, if no other date of commencement is therein provided.

(2) Where an Act contains a provision that the Act or any portion thereof is to come into force on a day later than the date of assent to the Act, such provision shall be deemed to have come into force on the date of assent to the Act.

(3) Where an Act provides that certain provisions thereof are to come or shall be deemed to have come into force on a day other than the date of assent to the Act, the remaining provisions of the Act shall be deemed to have come into force on the date of assent to the Act.

Day Fixed for Commencement or Repeal

Operation when date fixed for commencement or repeal — When no date fixed.

6. (1) Where an enactment is expressed to come into force on a particular day, it shall be construed as coming into force upon the expiration of the previous day; and where an enactment is expressed to expire, lapse or otherwise cease to have effect on a particular day, it shall be construed as ceasing to have effect upon the commencement of the following day.

(2) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force

(a) in the case of an Act, upon the expiration of the day immediately before the day the Act was enacted;

- (b) in the case of a regulation of a class that is not exempted from the application of subsection 5(1) of the *Statutory Instruments Act*, upon the expiration of the day immediately before the day the regulation was registered pursuant to section 6 of that Act; and
 - (c) in the case of a regulation of a class that is exempted from the application of subsection 5(1) of the *Statutory Instruments Act*, upon the expiration of the day immediately before the day the regulation was made.
- R.S.C. 1970 (2nd Supp.), c. 29, s. 1(1).

Regulation Prior to Commencement

Preliminary proceedings.

7. Where an enactment is not in force and it contains provisions conferring power to make regulations or do any other thing, that power may, for the purpose of making the enactment effective upon its commencement, be exercised at any time before its commencement, but a regulation so made or a thing so done has no effect until the commencement of the enactment except in so far as may be necessary to make the enactment effective upon its commencement.

Territorial Operation

Territorial operation — Amending enactment — Extra-territorial operation.

8. (1) Every enactment applies to the whole of Canada, unless it is otherwise expressed therein.

(2) Where an enactment that does not apply to the whole of Canada is amended, no provision in the amending enactment applies to any part of Canada to which the amending enactment does not apply, unless it is therein provided that the amending enactment applies to such part of Canada or the whole of Canada.

(3) Every Act of the Parliament of Canada now in force enacted prior to the 11th day of December 1931 that in terms or by necessary or reasonable implication was intended, as to the whole or any part thereof, to have extra-territorial operation, shall be construed as if at the date of its enactment the Parliament of Canada then had full power to make laws having extra-territorial operation as provided by the *Statute of Westminster, 1931*.

RULES OF CONSTRUCTION

Private Acts

Provisions in private Acts.

9. No provision in a private Act affects the rights of any person, except only as therein mentioned or referred to.

Law Always Speaking

10. The law shall be considered as always speaking, and whenever a matter or thing is expressed in the present tense, it shall be applied to the circum-

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stances as they arise, so that effect may be given to the enactment and every part thereof according to its true spirit, intent and meaning.

Enactments Remedial

Enactments deemed remedial.

11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Preambles and Marginal Notes

Preamble.

12. The preamble of an enactment shall be read as a part thereof intended to assist in explaining its purport and objects.

Marginal notes.

13. Marginal notes and references to former enactments in an enactment after the end of a section or other division thereof form no part of the enactment, but shall be deemed to have been inserted for convenience of reference only.

Application of Definitions

Application of interpretation provisions — Interpretation sections subject to exceptions.

14. (1) Definitions or rules of interpretation contained in an enactment apply to the construction of the provisions of the enactment that contain those definitions or rules of interpretation, as well as to the other provisions of the enactment.

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

- (a) as being applicable only if the contrary intention does not appear, and
- (b) as being applicable to all other enactments relating to the same subject-matter unless the contrary intention appears.

Words in regulations.

15. Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

Her Majesty

Her Majesty not bound or affected unless stated.

16. No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to.

Proclamations

Proclamation — Proclamation to be issued on advice — Date of proclamation — Judicial notice of proclamation.

17. (1) Where an enactment authorizes the issue of a proclamation, the proclamation shall be understood to be a proclamation of the Governor in Council.

(2) Where the Governor General is authorized to issue a proclamation, the proclamation shall be understood to be a proclamation issued under an order of the Governor in Council, but it is not necessary to mention in the proclamation that it is issued under such order.

(3) Where the Governor in Council has authorized the issue of a proclamation, the proclamation may purport to have been issued on the day its issue was so authorized, and the day on which it so purports to have been issued shall be deemed to be the day on which the proclamation takes effect.

(4) Where an enactment is expressed to come into force on a day to be fixed by proclamation, judicial notice shall be taken of the issue of the proclamation and the day fixed thereby without being specially pleaded.

Oaths

Administration of oaths — Where justice of peace empowered.

18. (1) Where by an enactment or by a rule of the Senate or House of Commons, evidence under oath is authorized or required to be taken or an oath is authorized or directed to be made, taken or administered, the oath may be administered, and a certificate of its having been made, taken or administered may be given by any one authorized by the enactment or rule to take the evidence, or by a judge of any court, a notary public, a justice of the peace, or a commissioner for taking affidavits, having authority or jurisdiction within the place where the oath is administered.

(2) Where power is conferred upon a justice of the peace to administer an oath or affirmation, or to take an affidavit or declaration, the power may be exercised by a notary public or a commissioner for taking oaths.

Reports to Parliament

19. Where an Act requires a report or other document to be laid before Parliament and, in compliance with the Act, a particular report or document has been laid before Parliament at a session thereof, nothing in the Act shall be construed as requiring the same report or document to be laid before Parliament at any subsequent session thereof.

Corporations

Powers vested in corporations — Corporate name — Banking business.

20. (1) Words establishing a corporation shall be construed

(a) to vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is established and to alienate the same at pleasure;

(b) in the case of a corporation having a name consisting of an English and a French form or a combined English and French form, to vest in the cor-

poration power to use either the English or the French form of its name or both forms and to show on its seal both the English and French forms of its name or have two seals, one showing the English and the other showing the French form of its name;

(c) to vest in a majority of the members of the corporation the power to bind the others by their acts; and

(d) to exempt from personal liability for its debts, obligations or acts such individual members of the corporation as do not contravene the provisions of the enactment establishing the corporation.

(2) Where an enactment establishes a corporation and in each of the English and French versions of the enactment the name of the corporation is in the form only of the language of that version, the name of the corporation shall consist of the form of its name in each of the versions of the enactment.

(3) No corporation shall be deemed to be authorized to carry on the business of banking unless such power is expressly conferred upon it by the enactment establishing the corporation.

Majority and Quorum

Majorities — Quorum of board, court, commission, etc.

21. (1) Where an act or thing is required or authorized to be done by more than two persons, a majority of them may do it.

(2) Where an enactment establishes a board, court, commission or other body consisting of three or more members (in this section called an “association”),

(a) at a meeting of the association, a number of members of the association equal to

(i) at least one-half of the number of members provided for by the enactment, if that number is a fixed number, and

(ii) if the number of members provided for by the enactment is not a fixed number but is within a range having a maximum or minimum, at least one-half of the number of members in office if that number is within the range,

constitutes a quorum;

(b) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, shall be deemed to have been done by the association; and

(c) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office is not less than a quorum.

Appointment, Retirement and Powers of Officers

Public officers hold office during pleasure — Effective day of appointments — Appointment or engagement otherwise than under Great Seal — Remuneration — Commencement of appointments or retirements

22. (1) Every public officer appointed before, on or after the 1st day of

September 1967, by or under the authority of an enactment or otherwise, shall be deemed to have been appointed to hold office during pleasure only, unless it is otherwise expressed in the enactment or in his commission or appointment.

(2) Where an appointment is made by instrument under the Great Seal, the instrument may purport to have been issued on or after the day its issue was authorized, and the day on which it so purports to have been issued shall be deemed to be the day on which the appointment takes effect.

(3) Where in any enactment there is authority to appoint a person to a position or to engage the services of a person, otherwise than by instrument under the Great Seal, the instrument of appointment or engagement may be expressed to be effective on or after the day on which such person commenced the performance of the duties of the position or commenced the performance of the services, and the day on which it is so expressed to be effective, unless that day is more than sixty days before the day on which the instrument is issued, shall be deemed to be the day on which the appointment or engagement takes effect.

(4) Where a person is appointed to an office, the appointing authority may fix, vary or terminate his remuneration.

(5) Where a person is appointed to an office effective on a specified day or where the appointment of a person is terminated effective on a specified day, the appointment or termination, as the case may be, shall be deemed to have been effected immediately upon the expiration of the previous day.

Implied powers respecting public officers — Powers of acting Minister, successor or deputy — Successors to and deputy of policy officer — Powers of holder of public office.

23. (1) Words authorizing the appointment of a public officer to hold office during pleasure include the power of

- (a) terminating his appointment or removing or suspending him,
- (b) re-appointing or reinstating him, and
- (c) appointing another in his stead or to act in his stead,

in the discretion of the authority in whom the power of appointment is vested.

(2) Words directing or empowering a Minister of the Crown to do an act or thing, or otherwise applying to him by his name of office, include a Minister acting for him, or, if the office is vacant, a Minister designated to act in the office by or under the authority of an order in council, and also his successors in the office, and his or their deputy, but nothing in this subsection shall be construed to authorize a deputy to exercise conferred upon a Minister to make a regulation as defined in the *Statutory Instruments Act*, R.S.C. 1970 (2nd Supp.), c. 29, s. 1(2).

(3) Words directing or empowering any other public officer to do any act or thing, or otherwise applying to him by his name of office, include his successors in the office and his or their deputy.

(4) Where a power is conferred or a duty imposed on the holder of an office as such, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

Evidence

Documentary evidence — Queen's printer.

24. (1) Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact shall be deemed to be established in the absence of any evidence to the contrary.

(2) Every copy of an enactment having printed thereon what purports to be the name or title of the Queen's Printer and Controller of Stationery or the Queen's Printer shall be deemed to be a copy purporting to be printed by the Queen's Printer for Canada.

Computation of Time

Time limits and holidays — Clear days — Not clear days — Beginning and ending of prescribed periods — After specified day — Within a time — Calculation of a period of months after or before a specified day — Time of the day — Time when specified age attained.

25. (1) Where the time limited for the doing of a thing expires or falls upon a holiday, the thing may be done on the day next following that is not a holiday.

(2) Where there is a reference to a number of clear days or "at least" a number of days between two events, in calculating the number of days there shall be excluded the days on which the events happen.

(3) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating the number of days there shall be excluded the day on which the first event happens and there shall be included the day on which the second event happens.

(4) Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.

(5) Where a time is expressed to begin after or to be from a specified day, the time does not include that day.

(6) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.

(7) Where there is a reference to a period of time consisting of a number of months after or before a specified day, the number of months shall be counted from, but not so as to include, the month in which the specified day falls, and the period shall be reckoned as being limited by and including

(a) the day immediately after or before the specified day, according as the period follows or precedes the specified day; and

(b) the day in the last month so counted having the same calendar number

as the specified day, but if such last month has no day with the same calendar number, then the last day of that month.

(8) Where there is a reference to time expressed as a specified time of the day, the time shall be taken to mean standard time.

(9) A person shall be deemed not to have attained a specified number of years of age until the commencement of the anniversary, of the same number, of the day of his birth.

Miscellaneous Rules

Reference to magistrate, etc. — Ancillary powers — Powers to be exercised as required — Power to repeal — Forms — Gender — Number — Parts of speech and grammatical forms.

26. (1) Where anything is required or authorized to be done by or before a judge, provincial court judge, justice of the peace, or any functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where such thing is to be done.

(2) Where power is given to a person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing.

(3) Where a power is conferred or a duty imposed the power may be exercised and the duty shall be performed from time to time as occasion requires.

(4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to repeal, amend or vary the regulations and make others.

(5) Where a form is prescribed, deviations therefrom, not affecting the substance or calculated to mislead, do not invalidate the form used.

(6) Words importing male persons include female persons and corporations.

(7) Words in the singular include the plural, and words in the plural include the singular.

(8) Where a word is defined, other parts of speech and grammatical forms of the same word have corresponding meanings. 1985, c. 19, s. 206.

Offences

Indictable and summary conviction offences — Criminal Code to apply — Documents similarly construed.

27. (1) Where an enactment creates an offence,

(a) the offence shall be deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;

(b) the offence shall be deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate

that the offence is an indictable offence; and

(c) if the offence is one for which the offender may be prosecuted by indictment or for which he is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.

(2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of the *Criminal Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

(3) In a commission, proclamation, warrant or other document relating to criminal law or procedure in criminal matters

(a) a reference to an offence for which the offender may be prosecuted by indictment shall be construed as a reference to an indictable offence; and

(b) a reference to any other offence shall be construed as a reference to an offence for which the offender is punishable on summary conviction.

DEFINITIONS

28. In every enactment

“Act”, as meaning an Act of a legislature, includes an ordinance of the Yukon Territory or of the Northwest Territories;

“bank” or “chartered bank” means a bank to which the *Bank Act* applies;

“broadcasting” means any radiocommunication in which the transmissions are intended for direct reception by the general public;

“Clerk of the Privy Council” or “Clerk of the Queen’s Privy Council” means the Clerk of the Privy Council and Secretary to the Cabinet.

“commencement”, when used with references to an enactment, means the time at which the enactment comes into force;

“Commonwealth”, “British Commonwealth”, “Commonwealth of Nations” or “British Commonwealth of Nations” means the association of countries named in the schedule, which schedule may be amended from time to time by proclamation of the Governor in Council

(a) by adding thereto the name of any country recognized by such proclamation to be a member of the Commonwealth, or

(b) by deleting therefrom the name of any country recognized by such proclamation to be no longer a member of the Commonwealth;

and “Commonwealth country” means a country that is a member of the association of such countries;

“Commonwealth and Dependent Territories” means the several Commonwealth countries and their colonies, possessions, dependencies, protectorates, protected states, condominiums and trust territories;

“county” includes two or more counties united for purposes to which the enactment relates;

“county court”, in its application to the Provinces of Ontario and New-

foundland, means “District Court”; 1978-79, c. 11, s. 10(1); 1984, c. 41, s. 2(1).

“diplomatic or consular officer” includes an ambassador, envoy, minister, charge d’affaires, counsellor, secretary, attache, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul, acting consular agent, high commissioner, permanent delegate, adviser, acting high commissioner, and acting permanent delegate;

“Federal Court” means the Federal Court of Canada;

“Federal Court — Appeal Division” or “Federal Court of Appeal” means that division of the Federal Court of Canada called the Federal Court — Appeal Division or referred to as the Federal Court of Appeal by the *Federal Court Act*;

“Federal Court — Trial Division” means that division of the Federal Court of Canada so named by the *Federal Court Act*.

“fiscal year” or “financial year” means, in relation to money provided by Parliament, or the Consolidated Revenue Fund, or the accounts, taxes or finances of Canada, the period beginning on and including the 1st day of April in one year and ending on and including the 31st day of March in the next year;

“Governor”, “Governor of Canada”, or “Governor General” means the Governor General for the time being of Canada, or other chief executive officer or administrator for the time being carrying on the Government of Canada on behalf and in the name of the Sovereign, by whatever title he is designated;

“Governor in Council”, or “Governor General in Council” means the Governor General of Canada, or person administering the Government of Canada for the time being, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen’s Privy Council for Canada;

“Great Seal” means the Great Seal of Canada;

“Her Majesty”, “His Majesty”, “the Queen”, “the King”, or “the Crown” means the Sovereign of the United Kingdom, Canada and Her other Realms and Territories, and Head of the Commonwealth;

“Her Majesty’s Realm and Territories” means all realms and territories under the sovereignty of Her Majesty;

“herein” used in any section shall be understood to relate to the whole enactment, and not to that section only;

“holiday” means any of the following days, namely, Sunday; New Year’s Day; Good Friday; Easter Monday; Christmas Day; the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning Sovereign; Victoria Day; Dominion Day; the first Monday in September, designated Labour Day; Remembrance Day; any day appointed by proclamation to be observed as a day of general prayer or mourning or day of public rejoicing or thanksgiving; and any of the following additional days, namely:

(a) in any province, any day appointed by proclamation of the lieutenant governor of the province to be observed as a public holiday or as a day of general prayer or mourning or day of public rejoicing or thanksgiving within the province, and any day that is a non-juridical day by virtue of an Act of the legislature of the province, and

(b) in any city, town, municipality or other organized district, any day appointed as a civic holiday by resolution of the council or other authority charged with the administration of the civic or municipal affairs of the city, town, municipality or district;

“legislature”, “legislative council” or “legislative assembly” includes the Lieutenant Governor in Council and the Legislative Assembly of the Northwest Territories, as constituted before the 1st day of September 1905, the Commissioner in Council of the Yukon Territory, and the Commissioner in Council of the Northwest Territories;

“Lieutenant governor” means the lieutenant governor for the time being, or other chief executive officer or administrator for the time being, carrying on the government of the province indicated by the enactment, by whatever title he is designated, and, in relation to the Yukon Territory or the Northwest Territories, means the Commissioner thereof;

“lieutenant governor in council” means the lieutenant governor, or person administering the government of the province indicated by the enactment, for the time being, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the executive council of such province and, in relation to the Yukon Territory or the Northwest Territories, means the Commissioner thereof;

“local time”, in relation to any place, means the time observed in that place for the regulation of business hours;

“may” is to be construed as permissive;

“military” shall be construed as relating to all or any part of the Canadian Forces;

“month” means a calendar month;

“now” or “next” shall be construed as having reference to the time when the enactment was enacted;

“oath” includes a solemn affirmation or declaration, whenever the context applies to any person by whom and case in which a solemn affirmation or declaration may be made instead of an oath; and in like cases the expression “sworn” includes the expression “affirmed” or “declared”;

“person” or any word or expression descriptive of a person, includes a corporation;

“proclamation” means a proclamation under the Great Seal;

“province” means a province of Canada, and includes the Yukon Territory and the Northwest Territories;

“radio” or “radiocommunication” means any transmission, emission or re-

ception of signs, signals, writing, images, sounds or intelligence of any nature by means of electro-magnetic waves of frequencies lower than three thousand Gigacycles per second propagated in space without artificial guide;

“regular force” means the component of the Canadian Forces that is referred to in the *National Defence Act* as the regular force;

“reserve force” means the component of the Canadian Forces that is referred to in the *National Defence Act* as the reserve force;

“shall” is to be construed as imperative;

“standard time”, except as otherwise provided by any proclamation of the Governor in Council which may be issued for the purposes of this definition in relation to any province or territory or any part thereof, means

(a) in relation to the Province of Newfoundland, Newfoundland standard time, being three hours and thirty minutes behind Greenwich time,

(b) in relation to the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, those parts of the Province of Quebec lying east of the sixty-third meridian of west longitude, and those parts of the Northwest Territories lying east of the sixty-eighth meridian of west longitude, Atlantic standard time, being four hours behind Greenwich time,

(c) in relation to those parts of the Province of Quebec lying west of the sixty-third meridian of west longitude, and those parts of the Province of Ontario lying between the ninetieth and the sixty-eighth meridians of west longitude, Southampton Island and the islands adjacent to Southampton Island, and that part of the Northwest Territories lying between the sixty-eighth and the eighty-fifth meridians of west longitude, eastern standard time, being five hours behind Greenwich time,

(d) in relation to that part of the Province of Ontario lying west of the ninetyth meridian of west longitude, the Province of Manitoba, and that part of the Northwest Territories, except Southampton Island and the islands of adjacent to Southampton Island, lying between the eighty-fifth and the one hundred and second meridians of west longitude, central standard time, being six hours behind Greenwich time,

(e) in relation to the Province of Saskatchewan, the Province of Alberta, and that part of the Northwest Territories lying west of the one hundred and second meridian of west longitude, mountain standard time, being seven hours behind Greenwich time,

(f) in relation to the Province of British Columbia, Pacific standard time, being eight hours behind Greenwich time, and

(g) in relation to the Yukon Territory, Yukon standard time, being nine hours behind Greenwich time;

“statutory declaration” means a solemn declaration made by virtue of the *Canada Evidence Act*;

“superior court” means

(a) in the Province of Ontario, Nova Scotia, Prince Edward Island, or Newfoundland, the Supreme Court of the Province, 1978-79, c. 11, s. 10(1).

(b) in the Province of Quebec, the Court of Appeal, and the Superior Court in and for the Province,

(c) in the Province of British Columbia, the Court of Appeal and the Supreme Court of the Province,

(d) in the Province of Manitoba, Saskatchewan, Alberta or New Brunswick, the Court of Appeal for the Province and the Court of Queen's Bench for the Province, 1978-79, c. 11, s. 10(1).

(e) in the Yukon Territory or the Northwest Territories, the Territorial Court thereof,

and includes the Supreme Court of Canada and the Exchequer Court of Canada;

“sureties” means sufficient sureties, and the expression “security” means sufficient security; and, whenever these words are used, one person is sufficient therefor, unless otherwise expressly required;

“telecommunication” means any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic system;

“two justices” means two or more justices of the peace, assembled or acting together;

“United Kingdom” means the United Kingdom of Great Britain and Northern Ireland;

“United States” means the United States of America;

“writing”, or any term of like import, includes words printed, typewritten, painted, engraved, lithographed, photographed, or represented or reproduced by any mode of representing or reproducing words in visible form;

“year” means any period of twelve consecutive months, except that a reference to a “calendar year” means a period of twelve consecutive months commencing on the first day of January and a reference by number to a Dominical year means the period of twelve consecutive months commencing on the first day of January of that year. R.S.C. 1970, c. 10 (2nd supp.), s. 65; 1972, c. 17, s. 2(2); 1974-75-76, c. 19, s. 2; 1974-75-76, c. 16, s. 4.

Affirmative and negative resolutions — Effect of negative resolution.

28.1 (1) In every act

(a) the expression “subject to affirmative resolution of Parliament”, when used in relation to any regulation, means that such regulation, shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and shall not come into force unless and until it is affirmed by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses;

(b) the expression “subject to affirmative resolution of the House of Commons”, when used in relation to any regulation, means that such regulation shall be laid before the House of Commons within fifteen days after it is made or, if the House is not then sitting, on any of the first fifteen days

next thereafter that the House is sitting and shall not come into force unless and until it is affirmed by a resolution of the House of Commons introduced and passed in accordance with the rules of that House;

(c) the expression “subject to negative resolution of Parliament”, when used in relation to any regulation, means that such regulation shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and may be annulled by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses; and

(d) the expression “subject to negative resolution of the House of Commons”, when used in relation to any regulation, means that such regulation shall be laid before the House of Commons within fifteen days after it is made or, if the House is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and may be annulled by a resolution of the House of Commons introduced and passed in accordance with the rules of that House.

(2) Where a regulation is annulled by a resolution of Parliament or of the House of Commons, as the case may be, it shall be deemed to have been revoked on the day the resolution is passed and any law that was revoked or amended by the making of that regulation shall be deemed to be revived on the day the resolution is passed but the validity of any action taken or not taken in compliance with a regulation so deemed to have been revoked shall not be affected by the resolution.

“Telegraph”.

29. The expression “telegraph” and its derivatives in an enactment or in an Act of the legislature of any province enacted before that province became part of Canada on any subject that is within the legislative powers of the Parliament of Canada, shall be deemed not to include the word “telephone” or its derivatives.

Common names.

30. The name commonly applied to any country, place, body, corporation, society, officer, functionary, person, party or thing, means the country, place, body, corporation, society, officer, functionary, person, party or thing to which the name is commonly applied, although the name is not the formal or extended designation thereof.

Power to define year.

31. Where in an enactment relating to the affairs of Parliament or the Government of Canada there is a reference to a period of a year without anything in the context to indicate beyond doubt whether a fiscal year, or any period of twelve consecutive months or a period of twelve consecutive months commencing on the first day of January is intended, the Governor in Council may prescribe which of such periods of twelve consecutive months shall constitute

a year for the purposes of the enactment.

REFERENCES AND CITATIONS

Citation of enactment — Citation includes amendment.

32. (1) In an enactment or document

(a) an Act may be cited by Reference to its chapter number in the Revised Statutes, by reference to its chapter number in the volume of Acts for the year or regnal year in which it was enacted, or by reference to its long title or short title, with or without reference to its chapter number; and

(b) a regulation may be cited by reference to its long title or short title, by reference to the Act under which it was made or by reference to the number or designation under which it was registered by the Clerk of the Privy Council.

(2) A citation of or reference to an enactment shall be deemed to be a citation of or reference to the enactment as amended.

Reference to two or more parts, etc. — Reference in enactments to parts, etc. — Reference in enactment to subsections, etc. — Reference to regulations — Reference to another enactment.

33. (1) A reference in an enactment by number or letter to two or more parts, divisions, sections, subsections, paragraphs, subparagraphs, clauses, subclauses, schedules, appendices or forms shall be read as including the number or letter first mentioned and the number or letter last mentioned.

(2) A reference in an enactment to a part, division, section, schedule, appendix or form shall be read as a reference to a part, division, section, schedule, appendix or form of the enactment in which the reference occurs.

(3) A reference in an enactment to a subsection, paragraph, subparagraph, clause or subclause shall be read as a reference to a subsection, paragraph, subparagraph, clause or subclause of the section, subsection, paragraph, subparagraph or clause, as the case may be, in which the reference occurs.

(4) A reference in an enactment to regulations shall be read as a reference to regulations made under the enactment in which the reference occurs.

(5) A reference in an enactment by number or letter to any section, subsection, paragraph, subparagraph, clause, subclause or other division or line of another enactment shall be read as a reference to the section, subsection, paragraph, subparagraph, clause, subclause or other division or line of such other enactment as printed by authority of law.

REPEAL AND AMENDMENT

Power of repeal or amendment reserved — Amendment or repeal at same session — Amendment part of enactment.

34. (1) Every Act shall be construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

(2) An Act may be amended or repealed by an Act passed in the same session of Parliament.

(3) An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends.

Effect of repeal.

35. Where an enactment is repealed in whole or in part, the repeal does not

- (a) revive any enactment or anything not in force or existing at the time when the repeal takes effect;
- (b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;
- (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;
- (d) affect any offence committed against or a violation of the provisions of the enactment so repealed, or any penalty, forfeiture or punishment incurred under the enactment so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.

Repeal and substitution.

36. Where an enactment (in this section called the “former enactment”) is repealed and another enactment (in this section called the “new enactment”) is substituted therefor,

- (a) every person acting under the former enactment shall continue to act, as if appointed under the new enactment, until another is appointed in his stead;
- (b) every bond and security given by a person appointed under the former enactment remains in force, and all books, papers, forms and things made or used under the former enactment shall continue to be used as before the repeal so far as they are consistent with the new enactment;
- (c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment;
- (d) the procedure established by the new enactment shall be followed as far as it can be adopted thereto in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights, existing or accruing under the former enactment or in a proceeding in relation to matters that have happened before the repeal;
- (e) when any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;
- (f) except to the extent that the provisions of the new enactment are not in

substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

(g) all regulations made under the repealed enactment remain in force and shall be deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead; and

(h) any reference in an unrepealed enactment to the former enactment shall, as regards a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

Repeal does not imply enactment was in force — Amendment does not imply change in law — Repeat does not declare previous law — Judicial construction not adopted.

37. (1) The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that such enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been previously in force.

(2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under such enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

(3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

(4) A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed upon the language used in the enactment or upon similar language.

DEMISE OF CROWN

Effect of demise — Continuation of proceedings.

38. (1) Where there is demise of the Crown,

(a) the demise does not affect the holding of any office under the Crown in right of Canada; and

(b) it is not necessary by reason of such demise that the holder of any such office again be appointed thereto or that, having taken an oath of office or allegiance before such demise, he again take such oath.

(2) No writ, action or other process or proceeding, civil or criminal, in or issuing out of any court established by an Act of the Parliament of Canada is,

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by reason of a demise of the Crown, determined, abated, discontinued or affected, but every such writ, action, process or proceeding remains in full force and may be enforced, carried on or otherwise proceeded with or completed as though there had been no such demise. 1967-68, c. 7, s. 39.

SCHEDULE

Australia	New Guinea
The Bahamas	New Zealand
Bangladesh	Nigeria
Barbados	Papua
Botswana	St. Lucia
Canada	St. Vincent
Cyprus	Seychelles
Dominica	Sierra Leone
Fiji	Singapore
Gambia	Solomon Islands
Ghana	Sri Lanka
Grenada	Swaziland
Guyana	Tanzania
India	Tonga
Jamaica	Trinidad and Tobago
Kenya	Tuvalu
Kiribati (Gilbert Islands)	Uganda
Lesotho	United Kingdom
Malawi	Vanuata
Malaysia	Western Samoa
Malta	Zambia
Mauritius	Zimbabwe
Nauru	1967-68, c. 7, Sch.

CHAPTER 219

The Interpretation Act

1.—(1) The provisions of this Act apply to every Act of the Legislature contained in these Revised Statutes or hereafter passed, except in so far as any such provision,

Application
of Act

(a) is inconsistent with the intent or object of the Act;
or

(b) would give to a word, expression or provision of the Act an interpretation inconsistent with the context;
or

(c) is in the Act declared not applicable thereto.

(2) Sections 2, 4, 9, 27 and 30 apply to the regulations made the authority of an Act. R.S.O. 1970, c. 225, s. 1.

Application
of certain
sections to
regulations

2. Where an Act contains an interpretation provision, it shall be read and construed as subject to the exceptions contained in subsection 1 (1). R.S.O. 1970, c. 225, s. 2.

Interpretation
provisions
in other
Acts

3. The provisions of this Act apply to the construction of it and to the words and expressions used in it. R.S.O. 1970, c. 225, s. 3.

Application
to this Act

RULES OF CONSTRUCTION

4. The law shall be considered as always speaking and, where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning. R.S.O. 1970, c. 225, s. 4.

Law always
speaking

5. Where an Act is not to come into operation immediately on the passing thereof and confers power to make an appointment to make, grant or issue an order, warrant, scheme, letters patent, rules, regulations or by-laws, to give notices, to prescribe forms, or to do any thing for the purposes of the Act, that power may be exercised at any time after the passing of the Act, but an instrument made under the power, unless the contrary is necessary for bringing the

What may
be done
under an
Act before
it is in
operation

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INTERPRETATION

Sec. 5

Act into operation, does not come into operation until the Act comes into operation. R.S.O. 1970, c. 225, s. 5.

Meaning of expressions used in instruments issued under an Act

6. Where an Act confers power to make, grant or issue an order, warrant, scheme, letters patent, rule, regulation or by-law, expressions used therein, unless the contrary intention appears, have the same meaning as in the Act conferring the power. R.S.O. 1970, c. 225, s. 6.

Judicial notice

7.—(1) Every Act shall be judicially noticed by judges, justices of the peace and others without being specially pleaded.

Idem

(2) Every proclamation shall be judicially noticed by judges, justices of the peace and others without being specially pleaded. R.S.O. 1970, c. 225, s. 8.

Effect of preamble

8. The preamble of an Act shall be deemed a part thereof and is intended to assist in explaining the purport and object of the Act. R.S.O. 1970, c. 225, s. 8.

Marginal notes, headings, etc., not part of Act

9. The marginal notes and headings in the body of an Act and references to former enactments form no part of the Act but shall be deemed to be inserted for convenience of reference only. R.S.O. 1970, c. 225, s. 9.

All Acts remedial

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of anything that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. R.S.O. 1970, c. 225, s. 10.

The Crown

11. No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby. R.S.O. 1970, c. 225, s. 11.

Private Acts

12. No Act of the nature of a private Act affects the rights of any person, or body corporate, politic or collegiate, such only excepted as are therein mentioned or referred to. R.S.O. 1970, c. 225, s. 12.

REPEAL, AMENDMENT AND CONSOLIDATION

Reservation of power to repeal or amend

13. Every Act shall be construed as reserving to the Legislature the power of repealing or amending it, and of revoking, restricting, or modifying any power, privilege or advantage thereby vested in or granted to any person or party, whenever

Sec. 14 (2)

INTERPRETATION

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the repeal, amendment, revocation, restriction or modification is considered by the Legislature to be required for the public good. R.S.O. 1970, c. 225, s. 13.

14.—(1) Where an Act is repealed or where a regulation is revoked, the repeal or revocation does not, except as in this Act otherwise provided, ^{Repeal, effect}

- (a) revive any Act, regulation or thing not in force or existing at the time at which the repeal or revocation takes effect;
- (b) affect the previous operation of any Act, regulation or thing so repealed or revoked;
- (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked;
- (d) affect any offence committed against any Act, regulation or thing so repealed or revoked, or any penalty or forfeiture or punishment incurred in respect thereof;
- (e) affect any investigation, legal proceeding or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture or punishment,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the Act, regulation or thing had not been so repealed or revoked.

(2) If other provisions are substituted for those so repealed or revoked, ^{When other provisions substituted}

- (a) all officers and persons acting under the Act, regulation or thing so repealed or revoked, shall continue to act as if appointed under the provisions so substituted until others are appointed in their stead;
- (b) all proceedings taken under the Act, regulation or thing so repealed or revoked, shall be taken up and continued under and in conformity with the provisions so substituted, as far as consistently may be;
- (c) in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights existing or accruing under the Act, regulation or thing so repealed or revoked, or in any other pro-

ceeding in relation to matters that have happened before the repeal or revocation, the procedure established by the substituted provisions shall be followed so far as it can be adopted; and

- (d) if any penalty, forfeiture or punishment is reduced or mitigated by any of the provisions of the Act, regulation or thing whereby such other provisions are substituted, the penalty forfeiture or punishment, if imposed or adjudged after such repeal or revocation, shall be reduced or mitigated accordingly. R.S.O. 1970, c. 225, s. 14.

Re-enactment,
amendment
consolidation
and revision

15. Where an Act is repealed and other provisions are substituted by way of re-enactment, amendment, revision or consolidation,

- (a) all regulations, orders, rules and by-laws made under the repealed Act continue good and valid in so far as they are not inconsistent with the substituted Act until they are annulled and others made in their stead; and
- (b) a reference in an unrepealed Act, or in a rule, order or regulation made thereunder to such repealed Act, shall, as regards any subsequent transaction, matter or thing be held and construed to be a reference to the provisions of the substituted Act relating to the same subject matter and, if there is no provision in the substituted Act relating to the same subject matter, the repealed Act stands good and shall be read and construed as unrepealed in so far, and in so far only, as is necessary to support, maintain or give effect to such unrepealed Act, or such rule, order or regulation made thereunder. R.S.O. 1970, c. 225, s. 15.

Repeal of
Act not a
declaration
that Act
was in force

16. The repeal of an Act shall be deemed not to be or to involve a declaration that the Act was or was considered by the Legislature to have been previously in force. R.S.O. 1970, c. 225, s. 16.

Repeal or
amendment
not a
declaration
of previous
law

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law. R.S.O. 1970, c. 225, s. 17.

Amendment
of Act not a
declaration
of different
state of law

18. The amendment of an Act shall be deemed not to be or to involve a declaration that the law under the Act was or was considered by the Legislature to have been different from

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the law as it has become under the Act as so amended.
R.S.O. 1970, c. 225, s. 18.

19. The Legislature shall not, by re-enacting, revising, consolidating or amending an Act, be deemed to have adopted the construction that has by judicial decision or otherwise been placed upon the language used in the Act or upon similar language. R.S.O. 1970, c. 225, s. 19.

Re-enactment
etc., not an
adoption of
judicial
construction

DEATH OF SOVEREIGN

19a. Where a reigning Sovereign dies, no rule or construction of law shall be applied so as to prevent the continuation of any matter under the successor to the Crown as if the death had not occurred. 1984, c. 11, s. 184(1).

PROCLAMATIONS

20. Where the Lieutenant Governor is authorized to do any act by proclamation, the proclamation is to be understood to be a proclamation issued under an order of the Lieutenant Governor in Council, but it is not necessary for the proclamation to mention that it is issued under such an order. R.S.O. 1970, c. 225, s. 20.

Lieutenant
Governor
acting by
proclamation

CROWN APPOINTMENTS

21. Authority to the Lieutenant Governor to make an appointment to an office, by commission or otherwise, shall be deemed authority to appoint during pleasure. R.S.O. 1970, c. 225, s. 21.

Tenure
of office

REGULATIONS

22. The Lieutenant Governor in Council may make regulations for the due enforcement and carrying into effect of any Act of the Legislature and, where there is no provision in the Act, may prescribe forms and may fix fees to be charged by all officers and persons by whom anything is required to be done. R.S.O. 1970, c. 225, s. 22.

Regulations

IMPRISONMENT

23. If in an Act a person is directed to be imprisoned or committed to prison, the imprisonment or committal shall, if no other place is mentioned or provided by law, be in or to the correctional institution of the locality in which the order for the imprisonment is made or, if there be no correctional institution there, then in or to the correctional institution that is nearest to such locality. R.S.O. 1970, c. 225, s. 23.

Imprison-
ment, place

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Hard labour

24. Where power to impose imprisonment is conferred by an Act, it shall be deemed to authorize the imposing of imprisonment with hard labour. R.S.O. 1970, c. 225, s. 24.

OFFENCE UNDER MORE THAN ONE PROVISION

Offence under more than one provision

25. Where an act or omission constitutes an offence under two or more Acts, the offender, unless the contrary intention appears, is liable to be prosecuted and punished under either or any of those Acts, but is not liable to be punished under either or any of those Acts, but is not liable to be punished twice for the same act or omission. R.S.O. 1970, c. 225, s. 25.

CORPORATIONS

Effect of words constituting a corporation

26. In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate,

- (a) vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal, to alter or change the seal at its pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purpose for which the corporation is constituted, and to alienate the same at pleasure;
- (b) vest in a majority of the members of the corporation the power to bind the others by their acts; and
- (c) exempt individual members of the corporation from personal liability for its debts, obligations or acts if they do not contravene the provisions of the Act incorporating them. R.S.O. 1970, c. 225, s. 26.

IMPLIED PROVISIONS

Implied provisions, as to jurisdiction

27. In every Act, unless the contrary intention appears,

- (a) where anything is directed to be done by or before a provincial judge or a justice of the peace or other public functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where it is to be done;
- (b) where power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer

implied powers

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or functionary to do or enforce the doing of the act or thing;

- (c) where an act or thing is required to be done by more than two persons, a majority of them may do it; acts to be done by more than two

- (d) where a form is prescribed, deviations therefrom not affecting the substance or calculated to mislead do not vitiate it; deviation from forms

- (e) where a power is conferred or duty is imposed on the holder of an office as such, the power may be exercised and the duty shall be performed from time to time as occasion requires; powers and duties to be exercised and performed from time to time

- (f) where a power is conferred or a duty is imposed on the holder of an office as such, the power may be exercised and the duty shall be performed by the holder of the office for the time being; to be exercised and performed by holder of office for time being

- (g) where power is conferred to make by-laws, regulations, rules or orders, it includes power to alter or revoke the same from time to time and make others; power to make by-laws, etc., to confer power to alter

- (h) where the time limited by an Act for a proceeding or for the doing of anything under its provisions expires or falls upon a holiday, the time so limited extends to and the thing may be done on the day next following that is not a holiday; computation of time where time limited expires on a holiday

- (i) where the time limited for a proceeding or for the doing of any thing in an office of the Supreme Court, or a county or district court office, or a surrogate court office, or a small claims court office, or a registry office, or a land titles office, or a sheriff's office expires or falls upon a day that is prescribed as a holiday for such office, the time so limited extends to and the thing may be done on the day next following that is not a holiday; computation of time where time limited expires on a holiday

- (j) words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse; number and gender

- (k) a word interpreted in the singular number has a corresponding meaning when used in the plural; idem

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words
authorizing
appointment
include
power to
remove

- (l) words authorizing the appointment of a public officer or functionary, or a deputy, include the power of removing him, reappointing him, or appointing another in his stead or to act in his stead, from time to time in the discretion of the authority in whom the power of appointment is vested;

directions
to public
officer to
apply to
his succe-
sors and
deputy
reference
to sections
by numbers

- (m) words directing or empowering a public officer or functionary to do an act or thing, or otherwise applying to him by his name of office, include his successors in office and his lawful deputy;
- (n) where reference is made by number to two or more sections, subsections, paragraphs, clauses, or other provisions in an Act, the number first mentioned and the number last mentioned shall both be deemed to be included in the reference;

words
authorizing
appointment
include
power to
appoint
deputy

- (o) words authorizing the appointment of a public officer or functionary or the appointment of a person to administer an Act include the power of appointing a deputy to perform and have all the powers and authority of such public officer or functionary or person to be exercised in such manner and upon such occasions as are specified in the instrument appointing him or such limited powers and authority as the instrument prescribes. R.S.O. 1970, c. 225, s. 27.

PROCEDURE

28. Repealed 1984, c. 11, s. 184(2).

29. Repealed 1984, c. 11, s. 184(2).

WORDS AND TERMS

Words and
terms

30. In every Act, unless the context otherwise requires,

1. "Act" includes enactment;
2. "affidavit", in the case of persons allowed by law to affirm or declare instead of swearing, includes affirmation and declaration;
3. "Assembly" means the Legislative Assembly of Ontario;
4. "county" includes two or more counties united for purposes to which the Act relates;

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5. "Court of Appeal" means the Court of Appeal for Ontario;
6. "Divisional Court" means the Divisional Court of the High Court of Justice for Ontario;
7. "Great Seal" means the Great Seal of Ontario;
8. "herein" used in a provision of an Act relates to the whole Act and not to that provision only;
9. "High Court" means the High Court of Justice for Ontario;
10. "Her Majesty", "His Majesty", "the Queen", "the King" or "the Crown" means the Sovereign of the United Kingdom, Canada and Her other Realms and Territories, and Head of the Commonwealth;
11. "holiday" includes Sunday, New Year's Day, Good Friday, Easter Monday, Christmas Day, the birthday or the day fixed by proclamation of the Governor General for the celebration of the birthday of the reigning Sovereign, Victoria Day, Dominion Day, Labour Day, Remembrance Day, and any day appointed by proclamation of the Governor General or the Lieutenant Governor as a public holiday or for a general fast or thanksgiving, and when any holiday, except Remembrance Day, falls on a Sunday, the day next following is in lieu thereof a holiday;
12. "justice of the peace" includes two or more justices of the peace or provincial judges assembled or acting together;
13. "legally qualified medical practitioner", "duly qualified medical practitioner", or any words importing legal recognition of a person as a medical practitioner or member of the medical profession, means a person licensed under Part III of the *Health Disciplines Act*; R.S.O. 1980, c. 196;
14. "Lieutenant Governor" means the Lieutenant Governor of Ontario, or the chief executive officer or administrator for the time being carrying on the government of Ontario by what ever title he is designated;

15. "Lieutenant Governor in Council" means the Lieutenant Governor of Ontario or the person administering the government of Ontario for the time being acting by and with the advice of the Executive Council of Ontario;
16. "may" shall be construed as permissive;
17. "mental defective" and "mentally defective person" means a person in whom there is a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, and who requires care, supervision and control for his own protection or welfare or for the protection of others;
18. "mental deficiency" means the condition of mind of a mental defective;
19. "mentally ill person" means a person, other than a mental defective, who is suffering from such a disorder of the mind that he requires care, supervision and control for his own protection or welfare, or for the protection of others;
20. "mental illness" means the condition of mind of a mentally ill person;
21. "mental incompetent" and "mentally incompetent person" means a person,
 - (a) in whom there is such a condition of arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, or
 - (b) who is suffering from such a disorder of the mind,

that he requires care, supervision and control for his protection and the protection of his property;
22. "mental incompetency" means the condition of the mind of a mentally incompetent person;
23. "month" means a calendar month;
24. "newspaper", in a provision requiring publication in a newspaper, means a printed publication in sheet form, intended for general circulation, published

regularly at intervals of not longer than a week, consisting in great part of news of current events of general interest and sold to the public and to regular subscribers upon a *bona fide* subscription list;

25. “now”, “next”, “heretofore” and “hereafter” shall be construed as having reference to the date of the coming into force of the Act;
26. “oath”, in the case of persons allowed by law to affirm or declare instead of swearing, includes affirmation and declaration;
27. “peace officer” includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff’s officer, and justice of the peace, and also the superintendent, governor, jailer, keeper, guard or any other officer or permanent employee of a correctional institution, and also a police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process;
28. “person” includes a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law;
29. “proclamation” means a proclamation under the Great Seal;
30. “registrar” includes a deputy registrar;
31. “Rules Committee” means the Rules Committee established under the *Courts of Justice Act 1984*; R.S.O. 1980,
c. 233
32. “rules of court”, when used in relation to a court, means rules made by the authority having power to make rules or orders regulating the practice and procedure of such court, or for the purpose of an Act directing or authorizing anything to be done by rules of court;
33. “security” means sufficient security, and “sureties” means sufficient sureties, and where these words are used, one person is sufficient therefor unless otherwise expressly required;
34. “shall” shall be construed as imperative;

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		35. “Supreme Court” means the Supreme Court of Ontario;	
		36. “swear”, in the case of the persons for the time being allowed by law to affirm or declare instead of swearing, includes affirm and declare, and “sworn” has a corresponding meaning;	
		37. “writing”, “written”, or any term of like import, includes words printed, painted, engraved, lithographed, photographed, or represented or reproduced by any other mode in a visible form;	
		38. “year” means a calendar year. R.S.O. 1970, c. 225, s. 30.	

SPECIAL INTERPRETATION CLAUSES

R.S.O. 1980, c. 302	31. The interpretation section of the <i>Courts of Justice Act, 1984</i> extends to all Acts relating to legal matters. R.S.O. 1970, c. 225, s. 31.
R.S.O. 1980, c. 223	32. The interpretation section of the <i>Municipal Act</i> extends to all Acts relating to municipal matters. R.S.O. 1970, c. 225, s. 32.

CHAPTER 244

Liquor Licence Act**1.** In this Act,

Interpretation

- (a) “alcohol” means a product of fermentation or distillation of grains, fruits or other agricultural products rectified once or more than once, whatever may be the origin thereof, and includes synthetic ethyl alcohol;
- (b) “beer” means any beverage containing alcohol in a proportion that is greater than that prescribed by the regulations obtained by the fermentation of an infusion or decoction of barley, malt and hops or of any similar products in drinkable water;
- (c) “Board” means the Liquor Licence Board referred to in section 2;
- (d) “government store” means a government store as established under the *Liquor Control Act*;
R.S.O. 1980,
c. 243
- (e) “licence” means a licence issued under this Act;
- (f) “liquor” means spirits, wine and beer or any combination thereof and includes any alcohol in a form appropriate for human consumption as a beverage alone or in combination with any other matter;
- (g) “manufacturer” means a person authorized under an Act of the Parliament of Canada to manufacture or produce any liquor;
- (h) “Minister” means the Minister of Consumer and Commercial Relations;
- (i) “municipality” means a city, town, village or township;
- (j) “Ontario wine” means,

- (i) wine produced from grapes, cherries, apples or other fruits grown in Ontario or the concentrated juice thereof and includes Ontario wine to which is added herbs, water, honey, sugar or the distillate of Ontario wine or cereal grains grown in Ontario,
- (ii) wine produced by the alcoholic fermentation of Ontario honey, with or without the addition of caramel, natural botanical flavours or the distillate of Ontario honey wine, or
- (iii) wine produced from a combination of,
 - (A) apples grown in Ontario or the concentrated juice thereof to which is added herbs, water, honey, sugar or the distillate of Ontario wine or cereal grains grown in Ontario, and
 - (B) the concentrated juice of apples grown outside of Ontario, in such proportion as is prescribed by regulation; 1984, c. 4, s. 1
- (k) “permit” means a permit issued under this Act;
- (l) “regulations” means the regulations made under this Act;
- (m) “sell” means to supply for remuneration, directly or indirectly, in any manner by which the cost is recovered from the person supplied, alone or in combination with others, and “sale” has a corresponding meaning;
- (n) “spirits” means any beverage that contains alcohol obtained by distillation;
- (o) “Tribunal” means The Commercial Registration Appeal Tribunal continued under the *Ministry of Consumer and Commercial Relations Act*; 1984, c. 4, s. 1;
- (p) “wine” means any beverage containing alcohol in a proportion that is greater than that prescribed by the regulations obtained by the fermentation of the natural sugar contents of fruits, including grapes, apples and other agricultural products containing

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sugar, and including honey and milk. 1975, c. 40, s. 1; 1975 (2nd Sess.), c. 17, s. 1.

2.—(1) The Liquor Licence Board is continued and shall consist of not more than seven members appointed by the Lieutenant Governor in Council. Liquor
Licence
Board
continued

(2) The Lieutenant Governor in Council may designate one of the members of the Board as chairman and one or more of the members as vice-chairmen. Chairman,
vice-
chairman

(3) The members of the Board shall be appointed to hold office for a term not exceeding five years and may be reappointed for further successive terms not exceeding five years each. Term

(4) The members of the Board shall be paid such salaries or other remuneration as may be fixed by the Lieutenant Governor in Council. Remuneration

(5) The chairman shall be the chief executive officer of the Board and shall devote his full time to the work of the Board, and the other members shall devote such time as may be necessary for the due performance of their duties as members of the Board. Duties of
chairman

(6) The Board is a corporation to which the *Corporations Act* does not apply. Corporation
R.S.O. 1980,
c. 95.

(7) The Board shall perform such duties as are assigned to it by or under this and any other Act and shall administer and enforce this Act and the regulations. Duties

(8) Subject to the approval of the Lieutenant Governor in Council, the Board may appoint such officers, inspectors and employees and retain such assistance as is considered necessary and may determine their salary, remuneration and terms and conditions of employment. Staff

(9) The revenues of the Board shall be paid to the Treasurer of Ontario and the moneys required for the expenditures of the Board shall be paid out of the moneys appropriated therefor by the Legislature. 1975, c. 40, s. 2. Finances

3. For the purposes of and subject to the *Crown Employees Collective Bargaining Act*, and the regulations thereunder, and subject to any further designation under that Act, the persons employed in the work of the Board are designated as a unit of employees that is an appropriate bargaining unit for collective bargaining purposes and the Liquor Control Board Bargaining
unit and
agent under
R.S.O. 1980,
c. 108

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of Ontario and Liquor Licence Board of Ontario Employees' Association is designated as the employee organization that has representation rights in relation to such bargaining unit. 1975, c. 40, s. 3 (3).

Licences and permits for sale of liquor

4.—(1) No person shall keep for sale, offer for sale or sell liquor except under the authority of a licence or permit issued by the Board.

Soliciting orders

(2) No person shall canvass for, receive or solicit orders for the sale of liquor unless he is the holder of a licence or permit issued by the Board under subsection (1) or unless he is registered under section 38.

Exception for beer and wine stores
R.S.O. 1980, c. 243

(3) Subsections (1) and (2) do not apply to the sale of liquor by or under the authority of the Liquor Control Board of Ontario under the *Liquor Control Act*.

Transfer of licences

(4) A licence issued under this section may be transferred, subject to the approval of the Board, on the application of the transferee.

Temporary transfers

(5) The Board may approve the transfer of a licence for a period of not more than six months, to permit the orderly disposition of licensed premises by a trustee in bankruptcy, receiver or liquidator authorized by statute or a court for the purpose or a mortgagee who enters into possession under the mortgage and section 6 does not apply. 1975, c. 40, s. 4.

Manufacturer's licence to sell

5.—(1) The Board may, subject to the approval of the Minister, issue a licence authorizing the manufacturer of spirits, beer or Ontario wine to keep for sale, offer for sale or sell such spirits, beer or Ontario wine to the Liquor Control Board of Ontario under the *Liquor Control Act* and the decision of the Board to issue or to refuse to issue a licence, with the approval of the Minister, is final.

Conditions

(2) A licence under subsection (1) may be issued subject to such terms or conditions as are prescribed in the licence or by the regulations. 1975, c. 40, s. 5.

Licence to sell other than by manufacturer

6.—(1) An applicant for a licence, or for approval of the transfer of a licence other than a licence referred to in section 5, is entitled to be issued the licence or have the transfer approved except where,

- (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business;

Sec. 6 (2)

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- (b) the applicant is not a Canadian citizen or a person lawfully admitted to Canada for permanent residence and ordinarily resident in Canada;
- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors or of a shareholder who owns or controls 10 per cent or more of its issued and outstanding equity shares as determined under section 19 affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty, or
 - (iii) a majority of the members of the board of directors are not Canadian citizens or persons lawfully admitted to Canada for permanent residence and ordinarily resident in Canada; 1981, c. 66, Sch. Item 7
- (d) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;
- (e) the applicant is carrying on activities that are or will be, if the applicant is licensed, in contravention of this Act or the regulations;
- (f) the premises and accommodation, equipment and facilities in respect of which the licence is issued do not comply with the provisions of this Act and the regulations applicable thereto;
- (g) in the case of an application for a licence, the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

(2) No licence shall be issued under this section or renewed and no approval of the transfer of a licence shall be given, Where issue of licence prohibited

- (a) to a person who is under agreement with any person to sell the liquor of any manufacturer;

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- (b) to a manufacturer of liquor, or his agent, or to a person who is so associated or connected therewith, or financially interested therein as to be likely to promote the sale thereof;
- (c) to a person who by reason of any agreement, arrangement, concession, obligation or understanding, verbal or written, or direct or indirect, with any other person is or by reason thereof may be likely to promote the sale of liquor of any manufacturer; or
- (d) for premises in which a manufacturer of liquor has an interest, whether freehold or leasehold, or by way of mortgage or charge or other encumbrance, or by way of mortgage, lien or charge upon any chattel property therein and whether such interest is direct or indirect or contingent or by way of suretyship or guarantee.

Publication
of notice of
application

(3) Where an application is made for a licence under this section and, subject to compliance with clause (1) (g), the applicant is not disentitled, the Board shall advertise the fact of the application, the nature of the licence applied for and the location of the premises at least twice in a newspaper having general circulation in the municipality in respect of which the licence is applied for and shall fix in the advertisement a time and place in the licensing district for the residents of the municipality to make representations to the Board concerning the application.

Public
representation

(4) The Board or such member or members thereof as are designated by the chairman shall hold a public meeting in accordance with the notice under subsection (3) for the purpose of receiving the representations referred to therein and shall take such representations into consideration for the purposes of this section. 1975, c. 40, s. 6.

(5) Where the issuance of a licence is refused on the grounds set out in clause (1) (g), no further application may be made for a licence for the same premises within two years after the completion of the public hearing.

(6) Where the Board is satisfied that there has been significant change in the circumstances that pertained at the time of the application that led to the hearing under subsection (3), it may permit a re-application within the two-year period referred to in subsection (5). 1984, c. 4, s. 2

Sec. 10 (1)

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7.—(1) A licence issued under section 4 or 5 expires two years after its issuance or latest renewal, subject to renewal by the Board in accordance with this Act and the regulations. Expiry

(2) Where, within the time prescribed therefor or, if no time is prescribed, before expiry of his licence, a licensee has applied for renewal of his licence and paid the prescribed fee, his licence shall be deemed to continue, Continuance
pending
renewal

(a) until the renewal is granted; or

(b) where he is served with notice that the Board proposes to refuse to grant the renewal, until the time for giving notice requiring a hearing has expired and, where a hearing is required, until the order has become final. 1975, c. 40, s. 7.

8.—(1) Subject to the regulations, the Board may issue a permit authorizing the holder thereof to keep for sale, offer for sale, sell or serve liquor on a special occasion. Special
occasion
permits

(2) An applicant for a permit for a special occasion that complies with the regulations is entitled to be issued the permit except upon the grounds set out in clause 6 (1) (d), (e) or (f) and subsection 6 (2) applies in respect of permits, with necessary modifications, in the same way as it applies in respect of licences. Issuance

(3) A permit may be issued by an officer of the Board designated by the Board for the purpose and such officer shall refer to the Board every application for a permit or renewal that he proposes to refuse. 1975, c. 40, s. 8. Idem

9.—(1) The Board may at any time review a licence or permit on its own initiative and attach such further terms and conditions as it considers proper to give effect to the purposes of this Act. Imposition
of new
terms and
conditions

(2) The Board may, on the application of the holder of a licence or permit, remove any term or condition to which the licence or permit is made subject under subsection (1) where there is a change or circumstances. 1975, c. 40, s. 10. Removal
of terms and
conditions

10.—(1) Subject to section 11, the Board may refuse to issue or approve the transfer of a licence under section 6 or to issue a permit under section 8 where, in the Board's opinion, the applicant is not entitled to a licence or permit under the provisions applicable thereto. Refusal
to issue

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Idem	(2) Subject to section 11, the Board may refuse to renew or may suspend or revoke a licence issued under section 5 for any reason referred to in clauses 6 (1) (e) and (f) or where the licensee is in breach of a term or condition of his licence.
Revocation, suspension or refusal to renew	(3) Subject to section 11, the Board may refuse to renew or may suspend or revoke a licence issued under section 6 for any reason that would disentitle the licensee to a licence under section 6 if he were an applicant or where the licensee is in breach of a term or condition of the licence.
Voluntary cancellation	(4) The Board may cancel a licence upon the request in writing of the licensee in the prescribed form surrendering his licence.
Revocation of permits	(5) Subject to section 11, the Board may revoke a permit issued under section 8 for any reason that would disentitle the holder to a permit if he were an applicant, or where the holder of the permit is in breach of a term or condition of the permit. 1975, c. 40, s. 11.
Notice of proposal	<p>11.—(1) Where the Board proposes,</p> <ul style="list-style-type: none"> (a) to refuse to issue a licence or permit, renew a licence or approve the transfer of a licence; (b) to suspend or revoke a licence or permit; or (c) to attach terms and conditions to a licence or permit or to refuse to remove a term or condition of a licence or permit under section 9, <p>it shall serve notice of its proposal together with written reasons therefor on the applicant or holder of the licence or permit affected.</p>
Interim suspension	(2) Where the Board proposes to suspend or revoke a licence or permit the Board may, where the Board considers it to be necessary in the public interest, by order temporarily suspend the licence or permit and the order shall take effect immediately and where a hearing is required expires fifteen days from the date of the notice requiring the hearing unless the hearing is commenced in which case the Board or Tribunal holding the hearing may extend the time of expiration until the hearing is concluded.
Notice requiring hearing	(3) A notice under subsection (1) shall inform the applicant or holder of the licence or permit that he is entitled to a hearing by the Board if he mails or delivers to the Board, within fifteen days after the notice under subsection (1) is served on

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him, notice in writing requiring a hearing by the Board, and he may so require such a hearing.

(4) Where an applicant or holder of the licence or permit does not require a hearing by the Board in accordance with subsection (3), the Board may carry out the proposal stated in its notice under subsection (1). 1975, c. 40, s. 12.

Powers of
Board
where no
hearing

12.—(1) Where the Board is required to hold a hearing under section 11, the chairman of the Board shall refer the application to two or more members of the Board designated by the chairman, who shall constitute the Board for interest in the application.

Members
holding
hearing

(3) Every person upon whom notice of a hearing is served and any other person added by the Board is a party to the proceedings.

Parties

(4) Each member of the Board has power to administer oaths and affirmations for the purpose of any of its proceedings.

Oaths

(5) The Board shall hold the hearing and give its decision and reasons therefor in writing to the parties to the proceedings.

Decision
and reasons

(6) An order of the Board revoking or suspending a licence or permit takes effect immediately unless otherwise provided in the order but, where a hearing by the Tribunal is required, the Tribunal may grant a stay until the Tribunal makes its decision. 1975, c. 40, s. 13.

Stay

13.—Repealed 1984, c. 1, s. 3.

14.—(1) Any party to a proceeding before the Board under section 12 who is aggrieved by the decision of the Board may, within fifteen days after he is served with the decision of the Board, mail or deliver to the Board and the Tribunal a notice in writing requiring a hearing by the Tribunal.

Hearing by
Tribunal

(2) Any person to whom a notice is given under section 11 may require a hearing by the Tribunal by giving notice in

Idem

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accordance with subsection (1) notwithstanding that he has not first required a hearing by the Board.

Powers of
Tribunal

(3) Where an applicant or holder of the licence or permit requires a hearing by the Tribunal in accordance with subsection (1), the Tribunal shall appoint a time for and hold the hearing and may by order confirm, alter or revoke the decision of the Board or direct the Board to take such action as the Tribunal considers the Board ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Board.

Conditions
of order

(4) The Tribunal may attach such terms and conditions to its order or to the licence or permit as it considers proper to give effect to the purposes of this Act.

Parties

(5) The Board, the applicant or the holder of the licence or permit who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section. 1975, c. 40, s. 15.

15. REPEALED: 1984, c. 1, s. 4.

Service

16.—(1) Any notice required to be given or served in connection with proceedings of or before the Board or the Tribunal is sufficiently given or served if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required to be made.

Where
service
deemed
to be
made

(2) Where service is made by registered mail, the service shall be deemed to be made on the third day after the day of mailing unless the person on whom service is being made establishes that he did not, acting in good faith, through absence, accident, illness or other cause beyond his control receive the notice or order until a later date.

Exception

(3) Notwithstanding subsections (1) and (2), the Tribunal may order any other method of service in respect of any matter before the Tribunal. 1975, c. 40, s. 17.

17. Notwithstanding subsection 11 (1) of the *Ministry of Consumer and Commercial Relations Act*, the decision of the Tribunal respecting the issuance of or refusal to issue a licence or permit or refusal to approve the transfer of a licence is final. 1984, c. 1, s. 5.

Appeal from
decision to
revoke, etc.

18.—(1) Any party to proceedings before the Tribunal respecting the revocation, suspension or refusal to renew a licence or permit, or the imposition of or refusal to remove a term or condition of a licence or permit may appeal from the

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decision of the Tribunal to the Division of Court in accordance with the rules of court.

(2) The Minister is entitled to be heard, by counsel or otherwise, upon the argument of an appeal under this section. Minister entitled to be heard

(3) Notwithstanding subsection 11 (5) of the *Ministry of Consumer and Commercial Relations Act*, an appeal under this section may be made on questions of law only.

(4) An order of the Tribunal revoking or suspending a licence or a permit takes effect upon the order being made but, where an appeal is made to the Divisional Court, the court may grant a stay until the disposition of the appeal. 1984, c. 1, s. 6.

19.—(1) In this section, “equity share” means a share of a class of shares that carries a voting right either under all circumstances or under some circumstances that have occurred and are continuing. “Equity share” defined

(2) Every licence or permit holder that is a corporation shall notify the Board in writing within thirty days after the issue or the entry of a transfer of any shares of its capital stock or the happening of a condition by which shares of its capital stock acquire voting rights where such issue, transfer or happening results in, Notice of transfer of shares

- (a) any shareholder and shareholders associated with him beneficially owning or controlling at least 10 per cent of the total number of all issued and outstanding equity shares of such stock; or
- (b) any shareholder and shareholders associated with him who already beneficially owns or controls 10 per cent or more of the total number of all issued and outstanding equity shares of such stock increasing such holding.

(3) In calculating the total number of equity shares of the corporation beneficially owned or controlled for the purposes of this section, the total number shall be calculated as the total of all the shares actually owned or controlled, but each share that carries the right to more than one vote shall be calculated as the number of shares equalling the total number of votes it carries. Idem

(4) Where a licence or permit holder that is a corporation is aware that a transfer which comes within the provisions of subsection (2) has taken place, it shall notify the Board in Idem

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writing within thirty days after such knowledge came to the attention of its officers or directors, and not within thirty days of the entry of the transfer.

Associated
shareholder

(5) For the purposes of subsection (2), a shareholder shall be deemed to be associated with another shareholder if,

- (a) one shareholder is a company of which the other shareholder is an officer or director;
- (b) one shareholder is a partnership of which the other shareholder is a partner;
- (c) one shareholder is a company that is controlled directly or indirectly by the other shareholder;
- (d) both shareholders are companies and one shareholder is controlled directly or indirectly by the same individual or company that controls directly or indirectly the other shareholder;
- (e) both shareholders are members of a voting trust where the trust relates to shares of a corporation; or
- (f) both shareholders are associated within the meaning of clauses (a) to (e) with the same shareholder.

Application
of s. 4(4)

(6) Where, in the opinion of the Board, an issue or transfer of equity shares of capital stock of a licensed corporation or the happening of a condition referred to in subsection (2) results in a shareholder and shareholders associated with him having a material or substantial interest in the corporation, such issue, transfer or happening shall be deemed to be a change of ownership and unless transferred under subsection 4 (4), the licence ceases to exist. 1975, c. 40, s. 20.

Investigation
by
Minister

20. The Minister may by order appoint a person to make an investigation into any matter to which this Act applies as may be specified in the Minister's order and the person appointed shall report the result of his investigation to the Minister and, for the purposes of the investigation, the person making it has the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to such investigation as if it were an inquiry under that Act. 1975, c. 40, s. 21.

R.S.O. 1980,
c. 411

Investiga-
tion by
Board

21.—(1) Where, upon a statement made under oath, the Board believes on reasonable and probable grounds that any person has,

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- (a) contravened any of the provisions of this Act or the regulations; or
- (b) committed an offence under the *Criminal Code* (Canada) or under the law of any jurisdiction that is relevant to his fitness for a licence or permit under this Act,

R.S.C. 1970,
c. C-34

the Board may, by order, appoint one or more persons to make an investigation to ascertain whether such a contravention of the Act or regulation or the commission of such an offence has occurred and the person appointed shall report the result of his investigation to the Board.

(2) For purposes relevant to the subject-matter of an investigation under this section, the person appointed to make the investigation may inquire into and examine the affairs of the person in respect of whom the investigation is being made and may,

Powers of
investigator

- (a) upon production of his appointment enter at any reasonable time the premises of such person, not including any premises or part thereof occupied as living accommodation, and examine books, papers, documents and things relevant to the subject-matter of the investigation; and
- (b) inquire into negotiations, transactions, loans, borrowings made by or on behalf of or in relation to such person and into property, assets or things owned, acquired or alienated in whole or in part by him or any person acting on his behalf that are relevant to the subject-matter of the investigation,

and for the purposes of the inquiry, the person making the investigation has the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to such inquiry as if it were an inquiry under that Act.

R.S.O. 1980,
c. 411

(3) No person shall obstruct a person appointed to make an investigation under this section or withhold from him or conceal or destroy any books, papers, documents or things relevant to the subject-matter of the investigation.

Obstruction
of
investigator

(4) Where a justice of the peace is satisfied, upon an *ex parte* application by the person making an investigation under this section, that the investigation has been ordered and that such person has been appointed to make it and that there is reasonable ground for believing there are in any building, dwelling, receptacle or place any books, papers, documents or

Search
warrant

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things relating to the person whose affairs are being investigated and to the subject-matter of the investigation, the justice of the peace may, whether or not an inspection has been made or attempted under clause (2) (a), issue an order authorizing the person making the investigation, together with such police officer or officers as he calls upon to assist him, to enter and search, if necessary by force, such building, dwelling, receptacle or place for such books, papers, documents or things and to examine them, but every such entry and search shall be made between sunrise and sunset unless the justice of the peace, by the order, authorizes the person making the investigation to make the search at night.

Removal
of books,
etc.

(5) Any person making an investigation under this section may, upon giving a receipt therefor, remove any books, papers, documents or things examined under clause (2) (a) or subsection (4) relating to the person whose affairs are being investigated and to the subject-matter of the investigation for the purpose of making copies of such books, papers or documents, but such copying shall be carried out with reasonable dispatch and the books, papers or documents in question shall be promptly thereafter returned to the person whose affairs are being investigated.

Admissibility
of copies

(6) Any copy made as provided in subsection (5) and certified to be a true copy by the person making the investigation is admissible in evidence in any action, proceeding or prosecution as *prima facie* proof of the original book, paper or document and its contents.

Appointment
of experts

(7) The Board may appoint any expert to examine books, papers, documents or things examined under clause (2) (a) or under subsection (4). 1975, c. 40, s. 22.

Inspections

22. Any person designated by the Board in writing may at any reasonable time enter upon any premises in respect of which a licence or permit is issued to make an inspection for the purpose of ensuring that the provisions of this Act and the regulations and the terms and conditions of the licence or permit are being complied with, and no person shall obstruct the person inspecting or withhold or destroy, conceal or refuse to furnish any information or thing required by the person inspecting for the purposes of the inspection. 1975, c. 40, s. 23.

Special
audit

23.—(1) The Board may at any time authorize and direct a representative of the Board appointed for that purpose to enter upon any premises where the books, accounts or records of or pertaining to any licensed manufacturer are kept or may be, and to inspect, study, audit, take extracts from such

books, accounts or other records, and may upon giving a receipt therefor, remove any such material that relates to the purpose of the inspection for the purpose of making a copy thereof, provided that such copying is carried out with reasonable dispatch and the material in question is promptly thereafter returned to the person being inspected, and no person shall obstruct the person inspecting or withhold or destroy, conceal or refuse to furnish any information or thing required by the person inspecting for the purposes of the inspection.

(2) Any copy made as provided in subsection (1) and purporting to be certified by an inspector is admissible in evidence in any action, proceeding or prosecution as *prima facie* proof of the original. 1975, c. 40, s. 24.

Admissibility
in evidence

24.—(1) Every person employed in the administration of this Act, including any person making an inquiry, inspection or an investigation under this Act, shall preserve secrecy in respect of all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection or investigation and shall not communicate any such matters to any other person except,

Matters
confidential

- (a) as may be required in connection with the administration of this Act and the regulations or any proceedings under this Act; or
- (b) to his counsel; or
- (c) with the consent of the person to whom the information relates.

(2) No person to whom subsection (1) applies shall be required to give testimony in any civil suit or proceeding with regard to information obtained by him in the course of his duties, employment, inquiry, inspection or investigation except in a proceeding under this Act. 1975, c. 40, s. 25.

Testimony
in civil suit

25. Subject to sections 26 and 27 and the regulations, no licence shall be issued or government store established of a class for the sale of liquor in a municipality,

Prohibited
areas

- (a) in which the sale of liquor or the sale of liquor under that class of licence or store was prohibited under the law as it existed immediately before the 4th day of February, 1976; or
- (b) in which, although the sale of liquor is not prohibited by law, no licence has been issued or govern-

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ment store established since the 16th day of September, 1916. 1975, c. 40, s. 26.

Submission
by council
to vote

26.—(1) The council of a municipality may submit one or more of the questions prescribed by the regulations respecting the authorization for the sale of liquor in the municipality to a vote.

Idem

(2) The council of a municipality shall submit to a vote such questions prescribed by the regulations respecting the authorization for the sale of liquor in the municipality as are requested by petition signed at least 25 per cent of the persons appearing on the list of electors, as revised, prepared for the previous municipal election. 1977, c. 62, s. 122.

Affirmative
vote

(3) Where 60 per cent of the electors voting on a question required to be submitted by virtue of clause 25 (a) vote in the affirmative, it is lawful to establish government stores, or issue the classes of licences in the municipality accordingly.

Idem

(4) Where 40 per cent of the electors voting on a question required to be submitted by virtue of clause 25 (b) vote in the affirmative, it is lawful to establish government stores or issue the classes of licences in the municipality accordingly. 1975, c. 40, s. 27 (2, 3).

Local option
to cease sale

27.—(1) The council of a municipality in which a government store is established or liquor is authorized to be sold under a licence may, and on petition as provided in section 26 shall, submit to the electors such questions respecting the closing of the store or premises as are prescribed by the regulations.

Where
negative
vote polled

(2) Where 60 per cent of the electors voting on the question or questions vote in the negative, from and after the 31st day of March in the following year, any government store established in the municipality shall be closed, or licences of any class for premises in the municipality shall be discontinued, as the case may be, in accordance with the question or questions submitted and voted upon. 1975, c. 40, s. 28.

Questions
not to be
submitted
again for
three years

28. Where a question is submitted in a municipality under section 26 or 27, neither that question nor any other question shall be submitted in the municipality until after the expiration of a period of three years from the date of such submission. 1975, c. 40, s. 29.

Day of
polling
R.S.O. 1980,
c. 308

29. The day fixed for taking the vote on any question or questions shall be the day upon which, under the *Municipal Elections Act*, a poll would be held at the election of members

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of the council of the municipality unless the council, with the approval of the Board, fixes some other day and notifies the clerk of the municipality to that effect, but a poll shall not be held on any such question or questions until after the expiration of two months from the passing of a by-law for submitting the question or questions where the council submits the question or questions without a petition, nor until after the expiration of two months from the filing of the petition, as the case may be. 1977, c. 62, s. 125, *part*.

30.—(1) The persons qualified to vote upon a question or questions are such persons as would be eligible to vote at an election held on that day pursuant to the *Municipal Elections Act*. 1977, c. 62, s. 124, *part*.

Who may
vote

(2) Where the vote is held on a day other than the date set for the election of members to the council of the municipality, for the purpose of determining the period during which a person may qualify as an elector entitled to vote on the question, the reference in paragraph 4 of subsection 92 (4) of the *Municipal Elections Act* to the order of the Ontario Municipal Board given under section 132 of the *Municipal Act* shall be deemed to be a reference to the date of the approval given by the Board as required by section 29 of this Act. 1978, c. 12, s. 8.

Qualification
period for
determining
eligibility
of electors

R.S.O. 1980,
c. 302

31. The provision of the *Municipal Elections Act* apply to the taking of a vote under this Act. 1977, c. 62, s. 124, *part*.

Application
of
R.S.O. 1980,
c. 308

32. The returning officer shall make his return to the Board showing the number of votes polled for the affirmative and negative on the question or questions submitted and, upon the receipt of such return, the Board shall give notice thereof in *The Ontario Gazette* showing the total number of votes polled in the municipality for the affirmative and negative upon the question or questions. 1977, c. 62, s. 124, *part*.

Return to
Board

33.—(1) No amalgamation of a municipality with another municipality and no annexation of the whole or a part of a municipality to another municipality affects the operation of this Act at the time of the amalgamation or annexation in the municipality amalgamated or municipality or part annexed or elsewhere until such operation is affected pursuant to a vote under this Act in the municipality amalgamated or municipality or part annexed, as the case may be. 1975, c. 40, s. 34 (1).

Amalgama-
tions,
annexations
not to affect
status quo
under Act

(2) The persons qualified to sign a petition pursuant to section 26 or 27 are the persons whose names appeared on the

Who entitled
to sign
petition

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list of electors, as revised, prepared for the previous municipal election held in the municipality amalgamated or municipality or part annexed, as the case may be.

Who
entitled
to vote

(3) The persons qualified to vote upon a question or questions are the persons who would be eligible to vote at an election held in the municipality amalgamated or municipality or part annexed, as the case may be, held pursuant to the *Municipal Elections Act*. 1977, c. 62, s. 125.

R.S.O. 1980,
c. 308

Interdiction
orders

34.—(1) Where it is made to appear to the satisfaction of the Board that a person, resident or sojourning in Ontario, by excessive drinking of liquor, misspends, wastes or lessens his estate, or injures his health, or interrupts the peace and happiness of his family, the Board may make an order of interdiction prohibiting the sale of liquor to him until further ordered.

Hearings

(2) Sections 11, 12 and 14 apply in respect of the proposal to make and the making of the interdiction order in the same manner as to a proposal to revoke and the revocation of a licence.

Disregard
of order

(3) Every interdicted person keeping or having in his possession or under his control or consuming any liquor is guilty of an offence, and the court making the conviction may in and by the conviction declare the liquor and all packages in which the liquor is contained forfeited to Her Majesty in right of Ontario.

Delivery of
liquor

(4) Upon an order of interdiction being made, the interdicted person shall deliver forthwith to the Board all liquor in his possession or under his control to be kept for him by the Board until the order of interdiction is revoked or set aside, or, at the option of the Board, such liquor may be purchased from him at a price to be fixed by the Board.

Notice
of order

(5) The Board shall notify all managers of government stores, and such other persons as are prescribed by the regulations of the order of interdiction.

Supply of
liquor to
interdicted
persons

(6) No person shall knowingly procure for, sell or give any liquor to an interdicted person, nor directly or indirectly assist in procuring or supplying any liquor to an interdicted person.

Interdicted
person not to
enter govern-
ment store

(7) No interdicted person shall enter upon the premises of a government store. 1975, c. 40, s. 35.

Setting
aside of
interdiction
order

35. Upon an application to the Board by a person in respect of whom an order of interdiction has been made, and upon it being made to appear to the satisfaction of the Board

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that the circumstances of the case did not warrant the making of the order of interdiction or upon proof that the interdicted person has refrained from drunkenness for at least twelve months immediately preceding the application, the Board may by order set aside the order of interdiction, and the interdicted person may be restored to all his rights under this Act and the regulations, and the Board shall accordingly forthwith notify all persons notified of the original order. 1975, c. 40, s. 36.

36.—(1) In this section,Interpre-
tation

- (a) “detoxification centre” means a public hospital designated by the regulations;
- (b) “municipality” means a municipality responsible for maintaining a police force.

(2) Where a police officer finds a person in a public place apparently in contravention of subsection 45 (4), he may take such person into custody and, in lieu of laying an information in respect of the contravention, may escort the person to a detoxification centre. 1981, c. 66, Sch. Item 7

Taking to
detoxifica-
tion centre
in lieu
of charge

(3) No action or other proceedings for damages shall be instituted against any physician or any hospital or officer or employee thereof on the grounds only that he examines or treats without consent a person in a detoxification centre under subsection (2) who is brought to the centre by a police officer. 1975, c. 40, s. 37.

Protection
from
liability

37. Where it appears that a person in contravention of subsection 45 (4) may benefit therefrom, the court may order the person to be detained for a period of ninety days or such lesser period as the court thinks advisable in an institution for the reclamation of alcoholics that is designated for the purpose by the regulations, but, if at any time during this period the superintendent of the institution is of the opinion that further detention therein will not benefit him, the superintendent may release him. 1981, c. 66, Sch. Item 7

Detention
for
reclamation

38.—(1) No person shall, directly or indirectly, hold himself out or act as agent or representative of a manufacturer in respect of the sale of liquor or canvass for, receive, take or solicit an order for the sale of liquor by a manufacturer or hold himself out or act as an agent or intermediary for the purpose unless he is registered with the Board as an agent or representative of such manufacturer.

Registration
of manu-
facturers'
agents

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Grounds
for refusal

(2) An applicant for registration is entitled to be registered except where the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with the law and with integrity and honesty.

Procedures

(3) The provisions of this Act applying to the issuance, refusal, suspension or revocation of a licence apply, with necessary modifications, to the granting, refusal, suspension or revocation of a registration. 1975, c. 40, s. 39.

Regulations

39. The Lieutenant Governor in Council may make regulations,

- (a) prescribing classes of licences and permits and the terms and conditions to which each class is subject;
- (b) providing for issuance of licences and for renewals and transfer thereof;
- (c) establishing licensing districts and prescribing the maximum number of licences for the sale of liquor in each licensing district or any part thereof;
- (d) prescribing classes of premises and confining the issuance of any specified class or classes of licences to any specified class or classes of premises;
- (e) providing for the reclassification of premises by the Board;
- (f) governing and providing for the issuance of permits for special occasions and prescribing the special occasions for which permits may be issued;
- (g) providing for the registration of agents and representatives of manufacturers;
- (h) regulating the conduct of agents and representatives registered under section 38;
- (i) requiring the payment of fees in respect of applications for and the issuance, renewal or transfer of licences, permits and registrations;
- (j) prescribing classes of licences or permits that may be issued in respect of premises in a municipality notwithstanding section 25;
- (k) requiring the holders of licences and permits to provide the Board with such information and returns

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respecting the sale of liquor and the premises, methods and practices connected therewith as is prescribed and requiring any information provided to be verified by oath;

- (l) controlling the advertising of liquor or its availability for sale and requiring that the form of advertisement or public notice be subject to the approval of the Board;
- (m) exempting uses of alcohol from the application of section 49;
- (n) prescribing the questions for the purpose of voting on questions under sections 26 and 27;
- (o) prescribing the form of ballots to be used for voting upon a question submitted in a municipality;
- (p) prescribing standards for premises or the part thereof used in connection with the sale of liquor by the holders of licences and permits and the accommodation, equipment and facilities therein and prescribing or prohibiting methods and practices in connection with the serving of liquor;
- (q) prescribing the circumstances under which the manufacturer of liquor may give by gift any liquor;
- (r) prescribing the minimum alcoholic content of wine and beer for the purposes of clauses 1 (b) and (p); 1981, c. 66, Sch. Item 7
- (s) prescribing classes of premises in which the sale of liquor is authorized on which a person under the age of eighteen years may enter;
- (t) designating public hospitals as detoxification centres;
- (u) designating institutions for the reclamation of alcoholics detained therein under section 37 and governing the transfer and admission of persons to and detention of persons in such institutions and providing for the government and operation of such institutions;
- (v) prescribing rules for proceedings before the Board or the Tribunal;

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- (w) prescribing the form and content of the application for and of the card for proof of age, requiring the payment of a fee for its issuance and prescribing the amount thereof;
- (x) exempting any person, product or premises or any class thereof from any provision of this Act or the regulations;
- (y) prescribing any matter that by this Act is required or permitted to be or referred to as prescribed by the regulations;
- (z) prohibiting or regulating and controlling the possession of liquor in provincial parks, in a park managed or controlled by the Niagara Parks Commission, the St. Lawrence Parks Commission, the St. Clair Parkway Commission or on lands owned or controlled by a conservation authority established or continued under the *Conservation Authority Act*, 1981, c. 1, s. 1.
- (za) regulating and controlling the possession of liquor sold under any class of licence or permit. 1984, c. 1, s. 7

Intoxicating
liquor for
purposes of
R.S.C. 1970,
c. 1-4

40. Liquor shall be deemed to be an intoxicating liquor for the purposes of the *Importation of Intoxicating Liquors Act* (Canada). 1975, c. 40, s. 41.

Unlawful
purchase

41. No person shall purchase liquor except from a government store or from a person authorized by licence or permit to sell. 1975, c. 40, s. 42.

Unlawful
gift by manu-
facturer

42. No manufacturer of liquor shall in Ontario, by himself, his clerk, servant or agent, give any liquor to any person, except as is permitted by and in accordance with the regulations. 1975, c. 40, s. 43.

Sale to
persons
under
influence

43. No person shall sell or supply liquor or permit liquor to be sold or supplied to any person in or apparently in an intoxicated condition. 1975, c. 40, s. 44.

Prohibition
re sale of
liquor

44.—(1) No person shall *knowingly* sell or supply liquor to a person under the age of nineteen years.

Idem

(2) No person shall sell or supply liquor to a person who is *apparently* under the age of nineteen years, and, in any prosecution for a contravention of this subsection, the justice

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shall determine from the appearance of such person and other relevant circumstances whether he is apparently under the age of nineteen years.

(3) No person under the age of nineteen years shall have, consume, attempt to purchase, purchase or otherwise obtain liquor. Prohibition re purchase of liquor

(4) Subsection (3) does not operate to prohibit a person of the age of eighteen years being in possession of liquor during the course of his employment on premises in which the sale of liquor is authorized. Where subs. (3) does not apply

(5) No person under the age of nineteen years shall enter or remain on premises in which the sale of liquor is authorized except those classes of premises that are prescribed by the regulations. Prohibition re entering premises

(6) Subsection (5) does not apply to a person of the age of eighteen years employed on premises in which the sale of liquor is authorized while he is on such premises during the course of his employment. Exception to subs. (5)

(7) This section does not apply to the supplying of liquor to a person under the age of nineteen years by the parent or guardian of such person in a residence as defined in section 45 or to the consumption of liquor therein by such person. Application of section

(8) A person who sells or supplies liquor to another person on the basis of,

- (a) a card in the form prescribed by the regulations purporting to be issued by the Board to the person producing it; or
- (b) such other documentation as is prescribed by the regulations indicating or disclosing information prescribed by the regulations,

where there is no apparent reason to doubt,

- (c) the authenticity of the card or other documentation; or
- (d) that it was issued to the person producing it, is not in contravention of subsection (1) or (2).

45.—(1) In this section,

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- (a) “public place” means a place to which the general public is invited or permitted access, whether or not for a fee;
- (b) “residence” means a place that is actually occupied and used as a dwelling, whether or not in common with other persons, including all premises used in conjunction therewith that is not a public place, and where the place occupied and used as a dwelling is a tent, includes the land immediately adjacent and used in conjunction therewith.

Unlawful
consumption

(2) No person shall consume liquor in any place other than a premises in respect of which a licence or permit is issued or a residence. 1975, c. 40, s. 46 (1, 2).

Unlawful
possession

(3) No person shall have liquor in any place other than a premises in respect of which a licence or permit is issued or a residence except where the liquor is in a closed container and the container is not displayed to public view. 1978, c. 42, s. 3 (1).

Intoxication
in public
place

(4) No person shall be in an intoxicated condition in a public place or in any part of a residence that is used in common by persons occupying more than one dwelling therein. 1975, c. 40, s. 46 (3)

Arrest
without
warrant

(5) A police officer may arrest without warrant any person whom he finds contravening subsection (4) where, in the opinion of the police officer, to do so is necessary for the safety of the person or is necessary to protect another person from injury. 1978, c. 42, s. 3 (2).

By-law
designating
public place

46.—(1) The council of a municipality, including a metropolitan or regional municipality, may by by-law designate stadia, arenas and other recreational areas within the municipality owned or controlled by the municipality as places where possession of liquor is prohibited.

Non-applica-
tion of
subs. (1)

(2) A designation under subsection (1) does not operate to prevent the Board from issuing any licence or permit under this Act.

Unlawful
possession

(3) No person shall have liquor in a place designated under subsection (1).

Exception
to subs. (3)

(4) Subsection (3) does not apply to a person in possession of liquor under the authority of a licence or permit or in possession of liquor purchased on premises in respect of which a licence or permit is issued. 1978, c. 42, s. 4.

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47.—(1) The holder of a licence or permit issued in respect of premises shall *ensure* that any person whom he has reasonable grounds to believe. Power to eject from licensed premises

- (a) is unlawfully on the premises;
- (b) is on the premises for an unlawful purpose; or
- (c) is contravening the law on the premises,

does not remain on the premises and may request the person to leave the premises immediately and if the request is not forthwith complied with may remove him or cause him to be removed by the use of no more force than is necessary.

(2) Where there are reasonable grounds to believe that a disturbance or breach of the peace is being caused on a licensed premises sufficient to constitute a threat to the public safety, a police officer may require that all persons vacate the premises and the holder of the licence or permit shall ensure, with the assistance of the police officer, if necessary, that the premises are vacated. 1975, c. 40, s. 47. Order to vacate premises

- (3) The holder of a licence or his employee may, Right to refuse entry
- (a) request a person to leave; or
 - (b) forbid a person to enter the licensed premises,

where he has reason to believe that the presence of that person on the premises is undesirable.

- (4) No person shall, Not to remain after request to leave
- (a) remain on licensed premises after he is requested to leave by the holder of the licence or his employee; or
 - (b) re-enter the licensed premises on the same day he was requested to leave. 1978, c. 42, s. 5.

48.—(1) No person shall drive or have the care or control of a motor vehicle as defined in the *Highway Traffic Act* or motorized snow vehicle, whether it is in motion or not, while there is contained therein any liquor, except, Conveying liquor in vehicle
R.S.O. 1980, c. 198

- (a) liquor in a bottle or package that is unopened and the seal unbroken; or

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- (b) liquor in a bottle or package that is packed with personal effects in baggage that is fastened closed or that is not otherwise readily available to any person in the vehicle.

Search of
vehicles

(2) A police officer may at any time, without a warrant, enter and search any vehicle or other conveyance in which he has reasonable grounds to believe that liquor is unlawfully kept or had, and search any person found in such vehicle or other conveyance. 1975, c. 40, s. 48.

Unlawful
consumption
of alcohol

49. No person shall,

- (a) drink alcohol in a form that is not a liquor; or
- (b) supply alcohol in a form that is not a liquor to another when he knows or ought to know that the other intends it to be used as a drink. 1975, c. 40, s. 49.

Regulation of
advertising

50.—(1) No person shall advertise liquor or display public notice that liquor is available for sale except in accordance with the regulations.

Order of
cessation

(2) Where the Board believes on reasonable and probable grounds that any advertisement or public notice is in contravention of this Act or the regulations, the Board may order the immediate cessation of the use of such advertisement or notice, and the provisions of this Act applying to the imposition by the Board of a condition of the licence apply with necessary modifications to the order, and the order of the Board shall take effect immediately, but the Tribunal may grant a stay until the Board's order becomes final. 1975, c. 40, s. 50.

Forfeiture
of liquor

51.—(1) Liquor kept for sale or offered for sale in contravention of section 4 and liquor purchased in contravention of section 41 is forfeited to the Board.

Report and
delivery

(2) Where liquor to which subsection (1) applies is seized by a police officer, he shall forthwith make or cause to be made a report of the particulars of the seizure to the Board and shall deliver the liquor or cause the liquor to be delivered to the Board as soon as the due process of the law permits. 1975, c. 40, s. 51.

Card
indicating
age

52.—(1) Any person who is over the age of nineteen years and not an interdicted person may apply to the Board for a card indicating that such person has attained the age of nineteen years.

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LIQUOR LICENCE

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(2) A card issued by the Board shall contain a photographic likeness of the applicant and otherwise be in the form prescribed by the regulations. Form of card

(3) No person shall supply false information or a false photographic likeness in an application made under subsection (1), or alter in any way, any card issued by the Board. False information

(4) No person shall present as evidence of his age any card purporting to be issued by the Board other than a card issued to him by the Board. 1975, c. 40, s. 52 (2-4). False card

53. Where any person or his servant or agent sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate him or increase his intoxication so that he would be in danger of causing injury to his person or injury or damage to the person or property of others, if the person to or for whom the liquor is sold while so intoxicated, Civil liability

- (a) commits suicide or meets death by accident, an action under Part V of the *Family Law Reform Act* lies against the person who or whose servant or agent sold the liquor; or R.S.O. 1980, c. 152
- (b) causes injury or damage to the person or property of another person, such other person is entitled to recover an amount to compensate him for his injury or damage from the person who or whose servant or agent sold the liquor. 1975, c. 40, s. 53.

54. Where a police officer finds a person contravening this Act and such person refuses to give his name and address or there are reasonable grounds to believe that the name or address given is false, the police officer may arrest such person without warrant. 1975, c. 40, s. 54. Arrest without warrant

55.—(1) Every person who, Offences

- (a) knowingly furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the regulations;
- (b) knowingly fails to comply with an order of the Board under subsection 50 (2);
- (c) contravenes any provision of this Act or the regulations.

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and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than one year, or to both. 1975, c. 40, s. 55 (1); 1978, c. 42, s. 7 (1).

Additional
penalty

(2) In addition to any other penalty or action under this Act, the licence of every person who contravenes subsection 44 (2) shall be suspended for a period of not less than seven days.

Minimum
fine

(3) Where a person who is the holder of a licence contravenes subsection 44 (2), the fine imposed under subsection (1) shall be not less than \$500.

Idem

(4) Where a person who is not the holder of a licence contravenes subsection 44 (2), the fine imposed under subsection (1) shall be not less than \$100. 1978, c. 42, s. 7 (2).

Corpora-
tions

(5) Where a corporation is convicted of an offence under subsection (1), the maximum penalty that may be imposed upon the corporation is \$25,000 and not as provided therein.

Consent of
Minister

(6) No proceeding to prosecute under clause (1) (a) or (b) shall be instituted except with the consent of the Minister.

Limitation

(7) No proceeding to prosecute under clause (1) (a) shall be commenced more than one year after the facts upon which the proceeding is based first came to the knowledge of the Board.

Idem

(8) No proceeding to prosecute under clause (1) (b) or (c) shall be commenced more than two years after the time when the subject-matter of the proceeding arose. 1975, c. 40, s. 55 (2-5).

Seizure
of liquor

56.—(1) Where liquor is found by a police officer under circumstances where the liquor constitutes evidence necessary to prove a contravention of this Act, or where an offence is committed under this Act and a police officer, on reasonable and probable grounds, in view of the offence committed and the presence of liquor, believes that a further offence is likely to be committed, the police officer may seize and take away the liquor and packages in which it is kept. 1978, c. 42, s. 8.

Order of
restoration

(2) A provincial offences court may, upon the application of any person made within thirty days of a seizure under subsection (1), order that the things seized be restored forthwith to the applicant where the court is satisfied that,

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- (a) the applicant is entitled to possession of the things seized; and
- (b) the things seized are not required as evidence in any proceedings in respect of an offence under this Act,

and where the court is satisfied that the applicant is entitled to possession of the things seized but is not satisfied as to the matter mentioned in clause (b), it shall order that the things seized be restored to the applicant,

- (c) upon the expiration of three months from the date of the seizure, if no proceedings in respect of an offence under this Act have been commenced; or
- (d) upon the final conclusion of any such proceedings.

(3) Where no application has been made for the return of any thing seized under subsection (1) or an application has been made but upon the hearing thereof no order of restoration has been made, the thing seized is forfeited to the Board. Forfeiture

(4) Where a person is convicted of an offence under this Act, any thing seized under subsection (1) by means of which the offence was committed is forfeited to the Board. 1975, c. 40, s. 56 (2-4). Idem

57. A statement as to,

Certificate
as evidence

- (a) the licensing or non-licensing of any person;
- (b) the filing or non-filing of any document or material required or permitted to be filed with the Board;
- (c) the time when the facts upon which proceedings are based first came to the knowledge of the Board; or
- (d) any other matter pertaining to such licence, non-licensing, filing or non-filing,

purporting to be certified by the chairman of the Board is, without proof of the office or signature of the chairman, receivable in evidence as *prima facie* proof of the facts stated therein for all purposes in any action, proceeding or prosecution. 1975, c. 40, s. 57.

58. In any prosecution under this Act or the regulations, upon production of a certificate or report signed or purporting to be signed by a federal or provincial analyst as to the analysis or ingredients of any liquor or other fluid or any prepar- Analysis

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ation, compound or substance, the certificate or report is conclusive evidence of the facts stated in the certificate or report and of the authority of the person giving or making it without any proof of appointment or signature. 1975, c. 40, s. 58.

Exception
for drugs
and
medicines

R.S.O. 1980,
c. 196

59. Nothing in this Act prevents the sale,

- (a) of a drug dispensed as a medicine by a person authorized to do so under the *Health Disciplines Act*;
- (b) of a drug compounded, dispensed or supplied in and by a hospital or a health or custodial institution approved or licensed under any general or special Act under the authority of a prescriber as defined in Part VI of the *Health Disciplines Act* for a person under health care provided by such hospital or health or custodial institution;
- (c) subject to section 49, of a medicine registered under the *Food and Drugs Act* (Canada); or
- (d) of a drug to a person authorized under the *Health Disciplines Act* to dispense, prescribe or administer drugs,

R.S.O. 1980,
c. 196

R.S.C. 1970,
c. F-27

of the purchase of such drug or medicine sold in accordance with this section. 1975, c. 40, s. 59; 1978, c. 42, s. 9.

CHAPTER 400

Provincial Offences Act**Extracts from**

INTERPRETATION

1.—(1) In this Act,

Interpretation

- (a) “certificate” means a certificate of offence issued under Part I or a certificate of parking infraction issued under Part II;
- (b) “court” means a provincial offences court or, where jurisdiction in respect of the offence is conferred upon a provincial court (family division) by any other Act, the provincial court (family division);
- (c) “judge” means a provincial judge;
- (d) “justice” means a provincial judge or a justice of the peace;
- (e) “offence” means an offence under an Act of the Legislature or under a regulation or by-law made under the authority of an Act of the Legislature;
- (f) “police officer” means a chief of police or other police officer or constable but does not include a special constable or by-law enforcement officer;
- (g) “prescribed” means prescribed by the rules of the provincial offences courts;
- (h) “prosecutor” means the Attorney General or, where the Attorney General does not intervene, means the person who issues a certificate or lays an information and includes counsel or agent acting on behalf of either of them;
- (i) “provincial offences officer” means a police officer or a person designated under subsection (2);

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- (j) “set fine” means the amount of fine set by the court for an offence for the purpose of proceedings commenced under Part I or II.

Designation
of pro-
vincial
offences
officers

(2) A minister of the Crown may designate in writing any person or class of persons as a provincial offences officer for the purposes of all or any class of offences. 1979, c. 4, s. 1.

Purpose of
Act

R.S.C. 1970,
c. C-34

2.—(1) The purpose of this Act is to replace the summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the *Criminal Code* (Canada), with a new procedure that reflects the distinction between provincial offences and criminal offences.

Interpretation

(2) Where, as an aid to the interpretation of provisions of this Act, recourse is had to the judicial interpretation of and practices under corresponding provisions of the *Criminal Code* (Canada), any variation in wording without change in substance shall not, in itself, be construed to intend a change of meaning. 1979, c. 4, s. 2.

PART I

COMMENCEMENT OF PROCEEDINGS BY
CERTIFICATE OF OFFENCE

Certificate
of offence

3.—(1) In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of an offence may be commenced by filing a certificate of offence alleging the offence in the office of the court named therein.

Issuance
and service

(2) A provincial offences officer who believes that one or more persons have committed an offence may issue, by completing and signing, a certificate of offence certifying that an offence has been committed and,

- (a) an offence notice indicating the set fine for the offence; or

- (b) a summons,

in the form prescribed under section 13.

Service

(3) The offence notice or summons shall be served personally upon the person charged within thirty days after the alleged offence occurred.

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(4) Upon the service of an offence notice or summons, the person charged shall be requested to sign the certificate of offence, but the failure or refusal to sign as requested does not invalidate the certificate of offence or the service of the offence notice or summons. Signature

(5) Where service is made by the provincial offences officer who issued the certificate of offence, he shall certify on the certificate of offence that he personally served the offence notice or summons on the person charged and the date of service. Certificate of service

(6) Where service is made by a person other than the provincial offences officer who issued the certificate of offence, he shall complete an affidavit of service in the prescribed form. Affidavit of service

(7) A certificate of service of an offence notice or summons purporting to be signed by the provincial offences officer issuing it or an affidavit of service under subsection (6) shall be received in evidence and is proof of personal service in the absence of evidence to the contrary. Certificate as evidence

(8) The provincial offences officer who serves an offence notice or summons under this section shall not receive payment of any money in respect of a fine, or receive the offence notice for delivery to the court. 1979, c. 4, s. 3. Officer not to act as agent

4. A certificate of offence shall be filed in the office of the court named therein as soon as practicable after service of the offence notice or summons. 1979, c. 4, s. 4. Filing of certificate of offence

5.—(1) Where an offence notice is served on a defendant, he may plead not guilty by signing the not guilty plea on the offence notice and indicate his desire in the form prescribed on the notice to appear or be represented at a trial and deliver the offence notice to the office of the court specified in the notice. Dispute with trial

(2) Where an offence notice is received under subsection (1), the clerk of the court shall, as soon as is practicable, give notice to the defendant and prosecutor of the time and place of the trial. 1979, c. 4, s. 5. Notice of trial

6.—(1) Where an offence notice is served on a defendant whose address as shown on the certificate of offence is outside the territorial jurisdiction of the court specified in the notice, and he wishes to dispute the charge but does not wish to attend or be represented at a trial, he may do so by signifying his intention on the offence notice and delivering the offence notice to the office of the court specified in the notice together Dispute without appearance

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Sec. 6 (1)

with a written dispute setting out with reasonable particularity his dispute and any facts upon which he relies.

Disposition

(2) Where an offence notice is delivered under subsection (1), a justice shall, in the absence of the defendant, consider the dispute and,

- (a) where the dispute raises an issue that may constitute a defence, direct a hearing; or
- (b) where the dispute does not raise an issue that may constitute a defence, convict the defendant and impose the set fine.

Hearing

(3) Where the justice directs a hearing under subsection (2), the court shall hold the hearing and shall, in the absence of the defendant, consider the evidence in the light of the issues raised in the dispute, and acquit the defendant or convict the defendant and impose the set fine or such lesser fine as is permitted by law.

Application
of section

(4) This section applies in such part or parts of Ontario as are prescribed by the regulations. 1979, c. 4, s. 6.

Plea of
guilty with
representa-
tions

7.—(1) Where an offence notice is served on a defendant and he does not wish to dispute the charge but wishes to make submissions as to penalty, including the extension of time for payment, he may attend at the time and place specified in the notice and may appear before a justice sitting in court for the purpose of pleading guilty to the offence and making submissions as to penalty, and the justice may enter a conviction and impose the set fine or such lesser fine as is permitted by law.

Submissions
under oath

(2) The justice may require submissions under subsection (1) to be made under oath, orally or by affidavit. 1979, c. 4, s. 7.

Payment
out of
court

8.—(1) Where an offence notice is served on a defendant and he does not wish to dispute the charge, he may sign the plea of guilty on the offence notice and deliver the offence notice and amount of the set fine to the office of the court specified in the notice.

Conviction

(2) Acceptance by the court office of payment under subsection (1) constitutes a plea of guilty whether or not the plea is signed and endorsement of payment on the certificate of offence constitutes the conviction and imposition of a fine in the amount of the set fine for the offence. 1979, c. 4, s. 8.

Sec. 12 (2)

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9. Where at least fifteen days have elapsed after the defendant was served with the offence notice and the offence notice has not been delivered in accordance with section 6 or 8 and a plea of guilty has not been accepted under section 7, the defendant shall be deemed to not wish to dispute the charge and a justice shall examine the certificate of offence and,

Failure to
respond to
offence
notice

- (a) where the certificate of offence is complete and regular on its face, he shall enter a conviction in the defendant's absence and without a hearing and impose the set fine for the offence; or
- (b) where the certificate of offence is not complete and regular on its face, he shall quash the proceeding.
1979, c. 4, s. 9.

10. A signature affixed to the form of plea of guilty or not guilty on an offence notice, purporting to be that of the defendant, is *prima facie* proof that it is the signature of that person. 1979, c. 4, s. 10.

Signature
on plea

11.—(1) Where the defendant has not had an opportunity to dispute the charge or to appear or be represented at a hearing for the reason that through no fault of his own the delivery of a necessary notice or document failed to occur in fact, and where not more than fifteen days have elapsed since the conviction first came to the attention of the defendant, the defendant may attend at the court office during regular office hours and may appear before a justice and the justice, upon being satisfied by affidavit in the prescribed form of such facts, shall strike out the conviction, if any, and give the person appearing a notice of trial under section 5 or proceed under section 7.

Reopening
on failure
of notice

(2) Where a conviction is struck out under subsection (1), the justice shall give the defendant a certificate of the fact in the prescribed form. 1979, c. 4, s. 11.

Certificate
of striking
out
conviction

12.—(1) Where the penalty prescribed for an offence includes a fine of not more than \$300 or imprisonment and proceedings are taken under this Part, the provision for fine or imprisonment does not apply and in lieu thereof the offence is punishable by a fine of not more than the maximum fine prescribed for the offence or \$300, whichever is the lesser.

Penalty

(2) Where a person is convicted of an offence in a proceeding initiated by an offence notice,

Other
consequences
of conviction

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Sec. 12 (2)

- (a) a provision in or under any other Act that provides for an action or result following upon a conviction of an offence does no apply to the conviction, except,
 - (i) for the purpose of carrying out the sentence imposed,
 - (ii) for the purpose of recording and proving the conviction,
 - (iii) for the purposes of the demerit point system under the *Highway Traffic Act*, and
 - (iv) for the purposes of section 30 of the *Highway Traffic Act*; and
- (b) any thing seized in connection with the offence after the service of the offence notice is not liable to forfeiture. 1979, c. 4, s. 12.

R.S.O. 1980,
c. 198

Regulations

13.—(1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing the form of certificates of offence, offence notices and summonses and such other forms as are considered necessary under this Part;
- (b) authorizing the use in a form prescribed under clause (a) of any word or expression to designate an offence;
- (c) respecting any matter that is considered necessary to provide for the use of the forms under this Part.

Sufficiency of
abbreviated
wording

(2) The use on a form prescribed under clause (1) (a) of any word or expression authorized by the regulations to designate an offence is sufficient for all purposes to describe the offence designated by such word or expression.

Idem

(3) Where the regulations do not authorize the use of a word or expression to describe an offence in a form prescribed under clause (1) (a), the offence may be described in accordance with section 26. 1979, c. 4, s. 13.

Sec. 16 (3)

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PART II

COMMENCEMENT OF PROCEEDINGS FOR PARKING
INFRACTIONS

14. In this Part, “Parking infraction” means any unlawful parking, standing or stopping of a vehicle that constitutes an offence. 1979, c. 4, s. 14. Interpretation

15.—(1) Subject to subsection (2), this Part does not apply in respect of parking infractions under by-laws of municipalities until a date two years after this Part comes into force. Date applicable to infractions under municipal by-laws

NOTE: Part II comes into force on a day to be named by proclamation of the Lieutenant Governor.

(2) Subject to the approval of the Lieutenant Governor in Council, the council of a municipality, including a regional, district or metropolitan municipality, may by by-law declare that this Part applies in respect of parking infractions under by-laws in the municipality on a date earlier than the date determined under subsection (1). 1979, c. 4, s. 15. Idem

16.—(1) In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of a parking infraction may be commenced by filing a certificate of the parking infraction in the office of the court named therein, within thirty days after the alleged offence occurred. Certificate of parking infraction and notice

(2) A provincial offences officer who believes from his personal knowledge that one or more persons have committed a parking infraction may issue, by completing and signing, Issuance and notice

- (a) a certificate of parking infraction certifying that a parking infraction has been committed; and
- (b) a parking infraction notice indicating the set fine for the infraction,

in the form prescribed under section 21.

(3) The issuing provincial offences officer may serve the parking infraction notice on the owner of the vehicle identified therein by affixing it to the vehicle in a conspicuous place at the time of the alleged infraction, or delivering it personally to the person having care and control of the vehicle at the time of the alleged infraction. 1979, c. 4, s. 16. Service of notice on owner

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Dispute
with trial

17.—(1) Where a parking infraction notice is served, the defendant may plead not guilty by signing the not guilty plea on the notice and indicate his desire in the form prescribed on the notice to appear or be represented at a trial and deliver it to the place specified in the notice.

Notice of
trial

(2) Where a parking infraction notice is received under subsection (1), the clerk of the court shall, as soon as is practicable, give notice to the defendant and prosecutor of the time and place of the trial. 1979, c. 4, s. 17.

Payment
out of
court

18. Where the defendant does not wish to dispute the charge, he may deliver the notice and amount of the set fine to the place shown on the notice. 1979, c. 4, s. 18.

Failure to
respond to
parking
infraction
notice

19.—(1) Where at least fifteen days have elapsed after the defendant was served with the parking infraction notice and the parking infraction notice has not been delivered in accordance with subsection 17 (1), the defendant shall be deemed to not wish to dispute the charge and a justice shall examine the certificate of parking infraction and where the justice is satisfied,

- (a) that the certificate of parking infraction is complete and regular on its face;
- (b) where the defendant is liable as owner, that he is the owner; and
- (c) that payment has not been made under section 18,

the justice shall enter a conviction in the defendant's absence and without a hearing and impose the set fine for the offence.

Quashing
proceeding

(2) Where the justice is not able to enter a conviction under subsection (1), he shall quash the proceeding.

Notice of
fine

(3) The clerk of the court shall give notice to the person against whom a conviction is entered under subsection (1) of the date and place of the infraction, the date of the conviction and the amount of the fine, and the fine or any part of the fine not paid within fifteen days after the giving of the notice shall be deemed to be in default. 1979, c. 4, s. 19.

Reopening
on failure
of notice

20. Where the defendant has not had an opportunity to dispute the charge or appear or be represented at a hearing for the reason that, through no fault of his own, the delivery of a necessary notice or document failed to occur in fact, and where not more than fifteen days have elapsed since the conviction first came to the attention of the defendant, the defen-

dant may attend at the court office during regular office hours and may appear before a justice and the justice, upon being satisfied by affidavit in the prescribed form of such facts, shall strike out the conviction, if any, and give the person appearing a notice of trial under subsection 17 (2) or accept a plea of guilty under section 18. 1979, c. 4, s. 20.

21.—(1) The Lieutenant Governor in Council may make regulations, Regulations

- (a) prescribing the form of certificates of parking infractions and parking infraction notices and such other forms as are considered necessary under this Part;
- (b) authorizing the use in a form prescribed under clause (a) of any word or expression to designate a parking infraction;
- (c) respecting any matter that is considered necessary to provide for the use of the forms under this Part.

(2) The use on a form prescribed under clause (1) (a) of any word or expression authorized by the regulations to designate a parking infraction is sufficient for all purposes to describe the infraction designated by such word or expression. Sufficiency of abbreviations

(3) Where the regulations do not authorize the use of a word or expression to describe a parking infraction in a form prescribed under clause (1) (a), the offence may be described in accordance with section 26. 1979, c. 4, s. 21. Idem

PART III

COMMENCEMENT OF PROCEEDING BY INFORMATION

22.—(1) In addition to the procedure set out in Parts I and II for commencing a proceeding by the filing of a certificate, a proceeding in respect of an offence may be commenced by laying an information. Commencement of proceeding by information

(2) Where a summons or offence notice has been served under Part I, no proceeding shall be commenced under subsection (1) in respect of the same offence except with the consent of the Attorney General or his agent. 1979, c. 4, s. 22. Exception

23. Where a provincial offences officer believes, on reasonable and probable grounds, that an offence has been committed by a person whom he finds at or near the place where the offence was committed, he may, before an information is Summons before information laid

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laid, serve the person with a summons in the prescribed form. 1979, c. 4, s. 23.

Information

24.—(1) Any person who, on reasonable and probable grounds, believes that one or more persons have committed an offence, may lay an information in the prescribed form and under oath before a justice alleging the offence and the justice shall receive the information.

Idem

(2) An information may be laid anywhere in Ontario. 1979, c. 4, s. 24.

Procedure
on laying
of
information

25.—(1) A justice who receives an information laid under section 24 shall consider the information and, where he considers it desirable to do so, hear and consider *ex parte* the allegations of the informant and the evidence of witnesses and,

(a) where he considers that a case for so doing is made out,

(i) confirm the summons served under section 23, if any,

(ii) issue a summons in the prescribed form, or

(iii) where the arrest is authorized by statute and where the allegations of the informant or the evidence satisfy the justice on reasonable and probable grounds that it is necessary in the public interest to do so, issue a warrant for the arrest of the defendant; or

(b) where he considers that a case for issuing process is not made out,

(i) so endorse the information, and

(ii) where a summons was served under section 23, cancel it and cause the defendant to be so notified.

Summons or
warrants
in blank

(2) A justice shall not sign a summons or warrant in blank. 1979, c. 4, s. 25.

Counts

26.—(1) Each offence charged in an information shall be set out in a separate count.

Allegation
of
offence

(2) Each count in an information shall in general apply to a single transaction and shall contain and is sufficient if it con-

Sec. 26 (7)

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tains in substance a statement that the defendant committed an offence therein specified.

(3) Where in a count an offence is identified but the count fails to set out one or more of the essential elements of the offence, a reference to the provision creating or defining the offence shall be deemed to incorporate all the essential elements of the offence.

Reference
to
statutory
provision

(4) The statement referred to in subsection (2) may be,

Idem

- (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
- (b) in the words of the enactment that describes the offence; or
- (c) in words that are sufficient to give to the defendant notice of the offence with which he is charged.

(5) Any number of counts for any number of offences may be joined in the same information.

More than
one count

(6) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the defendant reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to.

Particulars
of count

(7) No count in an information is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of this section and, without restricting the generality of the foregoing, no count in an information is insufficient by reason only that,

Sufficiency

- (a) it does not name the person affected by the offence or intended or attempted to be affected;
- (b) it does not name the person who owns or has a special property or interest in property mentioned in the count;
- (c) it charges an intent in relation to another person without naming or describing the other person;
- (d) it does not set out any writing that is the subject of the charge;

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Sec. 26 (7)

- (e) it does not set out the words used where words that are alleged to have been used are the subject of the charge;
- (f) it does not specify the means by which the alleged offence was committed;
- (g) it does not name or describe with precision any person, place or thing; or
- (h) it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained.

Idem

(8) A count is not objectionable for the reason only that,

- (a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an offence the matters, acts or omissions charged in the count; or
- (b) it is double or multifarious.

Need to
negative
exception,
etc.

(9) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information. 1979, c. 4, s. 26.

Summons

27.—(1) A summons issued under section 23 or 25 shall,

- (a) be directed to the defendant;
- (b) set out briefly the offence in respect of which the defendant is charged, and
- (c) require the defendant to attend court at a time and place stated therein and to attend thereafter as required by the court in order to be dealt with according to law.

Service

(2) A summons shall be served by a provincial offences officer by delivering it personally to the person to whom it is directed or if that person cannot conveniently be found, by leaving it for him at his last known or usual place of abode with an inmate thereof who appears to be at least sixteen years of age.

Service
outside
Ontario

(3) Notwithstanding subsection (2), where the person to whom a summons is directed does not reside in Ontario, the summons shall be deemed to have been duly served seven

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days after it has been sent by registered mail to his last known or usual place of abode.

(4) Service of a summons on a corporation may be effected by delivering the summons personally, Service on corporation

- (a) in the case of a municipal corporation, to the mayor, warden, reeve or other chief officer of the corporation or to the clerk of the corporation; or
- (b) in the case of any other corporation, to the manager, secretary or other executive officer of the corporation or person apparently in charge of a branch office thereof,

or by mailing the summons by registered mail to the corporation at an address held out by the corporation to be its address, in which case the summons shall be deemed to have been duly served seven days after the day of mailing.

(5) A justice, upon application and upon being satisfied that service can not be made effectively on a corporation in accordance with subsection (4), may by order authorize another method of service that has a reasonable likelihood of coming to the attention of the corporation. Substitutional service

(6) Service of a summons may be proved by statement under oath, written or oral, of the person who made the service. 1979, c. 4, s. 27. Proof of service

28.—(1) A warrant issued under section 25 shall, Contents of warrant

- (a) name or describe the defendant;
- (b) set out briefly the offence in respect of which the defendant is charged; and
- (c) order that the defendant be forthwith arrested and brought before a justice to be dealt with according to law.

(2) A warrant issued under section 25 remains in force until it is executed and need not be made returnable at any particular time. 1979, c. 4, s. 28. Idem

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Sec. 29

PART IV

TRIAL AND SENTENCING

Trial

Application of Part	29. This Part applies to proceedings commenced under this Act. 1979, c. 4, s. 29.
Proper court	30.— (1) Subject to subsection (2), a proceeding in respect of an offence shall be heard and determined in the provincial offences court in whose territorial jurisdiction the offence occurred.
Idem	(2) A proceeding in respect of an offence may be heard and determined in the provincial offences court having territorial jurisdiction that adjoins that in which the offence occurred if, <ul style="list-style-type: none">(a) the court holds sittings in a place reasonably proximate to the place where the offence occurred; and(b) the court and place of sitting referred to in clause (a) are named in the summons or offence notice.
Transfer to proper court	(3) Where a proceeding is taken in a court other than one referred to in subsection (1) or (2), the court shall order that the proceeding be transferred to the proper court and may where the defendant appears award costs under section 61.
Change of venue	(4) Where, upon the application of a defendant or prosecutor made to the court named in the information or certificate, it appears to the court that, <ul style="list-style-type: none">(a) it would be appropriate in the interests of justice to do so; or(b) both the defendant and prosecutor consent thereto, the court may order that the proceeding be transferred to another court in Ontario.
Conditions	(5) The court may, in an order made upon an application by the prosecutor under subsection (3) or (4), prescribe conditions that it thinks proper with respect to the payment of additional expenses caused to the defendant as a result of the change of venue.
Time of order for change of venue	(6) An order under subsection (3) or (4) may be made notwithstanding that any motion preliminary to trial has been dis-

posed of or that the plea has been taken and it may be made at any time before evidence has been heard.

(7) The court to which proceedings are transferred under this section may receive and determine any motion preliminary to trial notwithstanding that the same matter was determined by the court from which the proceeding was transferred.

Preliminary motions

(8) Where an order is made under subsection (3) or (4), the clerk of the court in which the trial was to be held before the order was made shall deliver any material in his possession in connection with the proceedings forthwith to the clerk of the court before which the trial is ordered to be held, and all proceedings in the case shall be held or, if previously commenced, shall be continued in that court. 1979, c. 4, s. 30.

Delivery of papers

31.—(1) The justice presiding when evidence is first taken at the trial shall preside over the whole of the trial.

Justice presiding at trial

(2) Where evidence has been taken at a trial and, before making his adjudication, the presiding justice dies or in his opinion or the opinion of the chief judge of the provincial offences courts is for any reason unable to continue, another justice shall conduct the hearing again as a new trial.

When presiding justice unable to act before adjudication

(3) Where evidence has been taken at a trial and, after making his adjudication but before making his order or imposing sentence, the presiding justice dies or in his opinion or the opinion of the chief judge of the provincial offences courts is for any reason unable to continue, another justice may make the order or impose the sentence that is authorized by law.

When presiding justice unable to act after adjudication

(4) A justice presiding at a trial may, at any stage of the trial and upon the consent of the prosecutor and defendant, order that the trial be conducted by another justice and, upon the order being given, subsection (2) applies as if the justice were unable to act. 1979, c. 4, s. 31.

Consent to change presiding justice

32. The court retains jurisdiction over the information or certificate notwithstanding the failure of the court to exercise its jurisdiction at any particular time or that the provisions of this Act respecting adjournments are not complied with. 1979, c. 4, s. 32.

Retention of jurisdiction

33.—(1) In addition to his right to withdraw a charge, the Attorney General or his agent may stay any proceeding at any time before judgment by direction in court to the clerk of the court in which the proceedings are conducted and thereupon any recognizance relating to the proceeding is vacated.

Stay of proceeding

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Sec. 33 (2)

Recommencement

(2) A proceeding stayed under subsection (1) may be recommenced by direction of the Attorney General, the Deputy Attorney General or a Crown attorney to the clerk of the court in which the proceeding was stayed but a proceeding that is stayed shall not be recommenced.

- (a) later than one year after the stay; or
- (b) after the expiration of any limitation period applicable, which shall run as if the proceeding had not been commenced until the recommencement,

whichever is the earlier. 1979, c. 4, s. 33.

Dividing counts

34.—(1) A defendant may at any stage of the proceeding apply to the court to amend or to divide a count that,

- (a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that creates or describes the offence; or
- (b) is double or multifarious,

on the ground that, as framed, it prejudices him in his defence.

Idem

(2) Upon an application under subsection (1), where the court is satisfied that the ends of justice so require, it may order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided. 1979, c. 4, s. 34.

Amendment of information or certificate

35.—(1) The court may, at any stage of the proceeding, amend the information or certificate as may be necessary if it appears that the information or certificate,

- (a) fails to state or states defectively anything that is requisite to charge the offence;
- (b) does not negative an exception that should be negated; or
- (c) is in any way defective in substance or in form.

Idem

(2) The court may, during the trial, amend the information or certificate as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.

Sec. 37 (2)

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(3) A variance between the information or certificate and the evidence taken on the trial is not material with respect to, Variances between charge and evidence

- (a) the time when the offence is alleged to have been committed, if it is proved that the information was laid or certificate issued within the prescribed period of limitation; or
- (b) the place where the subject-matter of the proceedings is alleged to have arisen, except in an issue as to the jurisdiction of the court.

(4) The court shall, in considering whether or not an amendment should be made, consider, Considerations on amendment

- (a) the evidence taken on the trial, if any;
- (b) the circumstances of the case;
- (c) whether the defendant has been misled or prejudiced in his defence by a variance, error or omission; and
- (d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

(5) The question whether an order to amend an information or certificate should be granted or refused is a question of law. Amendment, question of law

(6) An order to amend an information or certificate shall be endorsed on the information or certificate as part of the record and the trial shall proceed as if the information or certificate had been originally laid as amended. 1979, c. 4, s. 35. Endorsement of order to amend

36. The court may, before or during trial, if it is satisfied that it is necessary for a fair trial, order that a particular, further describing any matter relevant to the proceedings, be furnished to the defendant. 1979, c. 4, s. 36. Particulars

37.—(1) An objection to an information or certificate for a defect apparent on its face shall be taken by motion to quash the information or certificate before the defendant has pleaded, and thereafter only by leave of the court. Motion to quash information or certificate

(2) The court shall not quash an information or certificate unless an amendment or particulars under section 34, 35 or 36 would fail to satisfy the ends of justice. 1979, c. 4, s. 37. Grounds for quashing

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Sec. 38

Costs on
amendment
or particulars

38. Where the information or certificate is amended or particulars are ordered and an adjournment is necessary as a result thereof, the court may make an order under section 61 for costs resulting from the adjournment. 1979, c. 4, s. 38.

Joinder
of counts or
defendants

39.—(1) The court may, before trial, where it is satisfied that the ends of justice so require, direct that separate counts, informations or certificates be tried together or that persons who are charged separately be tried together.

Separate
trials

(2) The court may, before or during the trial, where it is satisfied that the ends of justice so require, direct that separate counts, informations or certificates be tried separately or that persons who are charged jointly or being tried together be tried separately. 1979, c. 4, s. 39.

Issuance of
subpoena

40.—(1) Where a justice is satisfied that a person is able to give material evidence in a proceeding under this Act, the justice may issue a subpoena requiring the person to attend to give evidence and bring with him any writings or things referred to in the subpoena.

Service

(2) A subpoena shall be served and the service shall be proved in the same manner as a summons under section 27.

Attendance

(3) A person who is served with a subpoena shall attend at the time and place stated in the subpoena to give evidence and, if required by the subpoena, shall bring with him any writing or other thing that he has in his possession or under his control relating to the subject-matter of the proceedings.

Remaining
in
attendance

(4) A person who is served with a subpoena shall remain in attendance during the hearing and the hearing as resumed after adjournment from time to time unless he is excused from attendance by the presiding justice. 1979, c. 4, s. 40.

Arrest of
witness

41.—(1) Where a judge is satisfied upon evidence under oath, that a person is able to give material evidence that is necessary in a proceeding under this Act and,

(a) will not attend if a subpoena is served; or

(b) attempts to serve a subpoena have been made and have failed because he is evading service,

the judge may issue a warrant in the prescribed form for the arrest of the person.

Sec. 41 (9)

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(2) Where a person who has been served with a subpoena to attend to give evidence in a proceeding does not attend or remain in attendance, the court may, if it is established, Idem

(a) that the subpoena has been served; and

(b) that the person is able to give material evidence that is necessary,

issue or cause to be issued a warrant in the prescribed form for the arrest of the person.

(3) The police officer who arrests a person under a warrant issued under subsection (1) or (2) shall immediately take the person before a justice. Bringing before justice

(4) Unless the justice is satisfied that it is necessary to detain a person in custody to ensure his attendance to give evidence, the justice shall order the person released upon condition that he enter into a recognizance in such amount and with such sureties, if any, as are reasonably necessary to ensure his attendance. Release on recognizance

(5) Where a proceeding under subsection (4) is before a justice of the peace and the person is not released, the justice of the peace shall cause the person to be brought before a judge within two days of his decision. Bringing before judge

(6) Where the judge is satisfied that it is necessary to detain the person in custody to ensure his attendance to give evidence, the judge may order that the person be detained in custody to testify at the trial or to have his evidence taken by a commissioner under an order made under subsection (11). Detention

(7) Where the judge does not make an order under subsection (6), he shall order that the person be released upon condition that he enter into a recognizance in such amount and with such sureties, if any, as are reasonably necessary to ensure his attendance. Release on recognizance

(8) A person who is ordered to be detained in custody under subsection (6) or is not released in fact under subsection (7) shall not be detained in custody for a period longer than ten days. Maximum imprisonment

(9) A judge, or the justice presiding at a trial, may at any time order the release of a person in custody under this section where he is satisfied that the detention is no longer justified. Release when no longer required

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Sec. 41 (10)

Arrest on
breach of
recogniz-
ance

(10) Where a person who is bound by a recognizance to attend to give evidence in any proceeding does not attend or remain in attendance, the court before which the person is bound to attend may issue a warrant in the prescribed form for the arrest of that person and,

- (a) where he is brought directly before the court, subsections (6) and (7) apply; and
- (b) where he is not brought directly before the court, subsections (3) to (7) apply.

Commission
evidence of
witness in
custody

(11) A judge or the justice presiding at the trial may order that the evidence of a person held in custody under this section be taken by a commissioner under section 44, which applies thereto in the same manner as to a witness who is unable to attend by reason of illness. 1979, c. 4, s. 41.

Order for
person in
a prison
to attend

42.—(1) Where a person whose attendance is required in a court to stand trial or to give evidence is confined in a prison, and a judge is satisfied, upon evidence under oath orally or by affidavit, that his attendance is necessary to satisfy the ends of justice, the judge may issue an order in the prescribed form that the person be brought before the court before which his attendance is required, from day to day, as may be necessary.

Idem

(2) An order under subsection (1) shall be addressed to the person who has custody of the prisoner and on receipt thereof that person shall,

- (a) deliver the prisoner to the police officer or other person who is named in the order to receive him; or
- (b) bring the prisoner before the court upon payment of his reasonable charges in respect thereof.

Idem

(3) An order made under subsection (1) shall direct the manner in which the person shall be kept in custody and returned to the prison from which he is brought. 1979, c. 4, s. 42.

Penalty for
failure to
attend

43.—(1) Every person who, being required by law to attend or remain in attendance at a hearing, fails without lawful excuse to attend or remain in attendance accordingly is guilty of an offence and on conviction is liable to a fine of not more than \$1,000, or to imprisonment for a term of not more than thirty days, or to both.

Sec. 45 (1)

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(2) In a proceeding under subsection (1), a certificate of the clerk or a justice of the court before which the defendant is alleged to have failed to attend stating that the defendant failed to attend is admissible in evidence as *prima facie* proof of the fact without proof of the signature or office of the person appearing to have signed the certificate. 1979, c. 4, s. 43.

Proof of
failure to
attend

44.—(1) Upon the application of the defendant or prosecutor, a judge or, during trial, the court may by order appoint a commissioner to take the evidence of a witness who is out of Ontario or is not likely to be able to attend the trial by reason of illness or physical disability or for some other good and sufficient cause.

Order for
evidence by
commission

(2) Evidence taken by a commissioner appointed under subsection (1) may be read in evidence in the proceeding if,

Admission
of
commission
evidence

- (a) it is proved by oral evidence or by affidavit that the witness is unable to attend for a reason set out in subsection (1);
- (b) the transcript of the evidence is signed by the commissioner by or before whom it purports to have been taken; and
- (c) it is proved to the satisfaction of the court that reasonable notice of the time and place for taking the evidence was given to the other party, and the party had full opportunity to cross-examine the witness.

(3) An order under subsection (1) may make provision to enable the defendant to be present or represented by counsel or agent when the evidence is taken, but failure of the defendant to be present or to be represented by counsel or agent in accordance with the order does not prevent the reading of the evidence in the proceedings if the evidence has otherwise been taken in accordance with the order and with this section.

Attendance
of accused

(4) Except as otherwise provided by this section or by the rules, the practice and procedure in connection with the appointment of commissioners under this section, the taking of evidence by commissioners, the certifying and return thereof, and the use of the evidence in the proceedings shall, as far as possible, be the same as those that govern like matters in civil proceedings in the Supreme Court. 1979, c. 4, s. 44.

Application
of rules
in civil
cases

45.—(1) Where at any time before a defendant is sentenced a court has reason to believe, based on,

Trial of
issue as to
capacity to
conduct
defence

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Sec. 45 (1)

(a) the evidence of a legally qualified medical practitioner or, with the consent of the parties, a written report of a legally qualified medical practitioner; or

(b) the conduct of the defendant in the courtroom,

that the defendant suffers from mental disorder, the court may,

(c) where the justice presiding is a judge, by order suspend the proceedings and direct the trial of the issue as to whether the defendant is, because of mental disorder, unable to conduct his defence; or

(d) where the justice presiding is a justice of the peace, refer the matter to a judge who may make an order referred to in clause (c).

Examination (2) For the purposes of subsection (1), the court may order the defendant to attend to be examined under subsection (5).

Finding (3) The trial of the issue shall be presided over by a judge and,

(a) where he finds that the defendant is, because of mental disorder, unable to conduct his defence, he shall order that further proceeding on the charge be suspended;

(b) where he finds that the defendant is able to conduct his defence, he shall order that the suspended proceeding be continued.

Application for rehearing as to capacity (4) At any time within one year after an order is made under subsection (3), either party may, upon seven days notice to the other, apply to a judge to rehear the trial of the issue and where upon the rehearing the judge finds that the defendant is able to conduct his defence, he may order that the suspended proceeding be continued.

Order for examination (5) For the purposes of subsection (1) or a hearing or rehearing under subsection (3) or (4), the court or judge may order the defendant to attend at such place or before such person and at or within such time as are specified in the order and submit to an examination for the purpose of determining whether the defendant is, because of mental disorder, unable to conduct his defence.

Idem (6) Where the defendant fails or refuses to comply with an order under subsection (5) without reasonable excuse or

Sec. 47 (5)

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where the person conducting the examination satisfies a judge that it is necessary to do so, the judge may by warrant direct that the defendant be taken into such custody as is necessary for the purpose of the examination and in any event for not longer than seven days and, where it is necessary to detain the defendant in a place, the place shall be, where practicable, a psychiatric facility.

(7) Where an order is made under subsection (3) and one year has elapsed and no further order is made under subsection (4), no further proceeding shall be taken in respect of the charge or any other charge arising out of the same circumstance. 1979, c. 4, s. 45.

Limitation
on
suspension
of
proceeding

46.—(1) After being informed of the substance of the information or certificate, the defendant shall be asked whether he pleads guilty or not guilty of the offence charged therein.

Taking of
plea

(2) Where the defendant pleads guilty, the court may accept the plea and convict him.

Conviction
on plea of
guilty

(3) Where the defendant refuses to plead or does not answer directly, the court shall enter a plea of not guilty.

Refusal
to plead

(4) Where the defendant pleads not guilty of the offence charged but guilty of any other offence, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept such plea of guilty and accordingly amend the information or substitute the offence to which the defendant pleads guilty. 1979, c. 4, s. 46.

Plea of
guilty to
another
offence

47.—(1) Subject to section 6, where the defendant pleads not guilty, the court shall hold the trial.

Trial on
plea of
not guilty

(2) The defendant is entitled to make his full answer and defence.

Right to
defend

(3) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses.

Right to
examine
witnesses

(4) The court may receive and act upon any facts agreed upon by the defendant and prosecutor without proof or evidence.

Agreed
facts

(5) Notwithstanding section 8 of the *Evidence Act*, the defendant is not a compellable witness for the prosecution. 1979, c. 4, s. 47.

Defendant
not
compellable
R.S.O. 1980,
c. 145

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Sec. 48 (1)

Evidence
taken on
another
charge

48.—(1) The court may receive and consider evidence taken before the same justice on a different charge against the same defendant, with the consent of the parties.

Certificate
as evidence

(2) Where a certificate as to the content of an official record is, by any Act, made admissible in evidence as *prima facie* proof, the court may, for the purpose of deciding whether the defendant is the person referred to in the certificate, receive and base its decision upon information it considers credible or trustworthy in the circumstances of each case.

Burden of
proving
exception,
etc.

(3) The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information. 1979, c. 4, s. 48.

Exhibits

49.—(1) The court may order that an exhibit be kept in such custody and place as, in the opinion of the court, is appropriate for its preservation.

Release of
exhibits

(2) Where any thing is filed as an exhibit in a proceeding, the clerk may release the exhibit upon the consent of the parties at any time after the trial or, in the absence of consent, may return the exhibit to the party tendering it after the disposition of any appeal in the proceeding or, where an appeal is not taken, after the expiration of the time for appeal. 1979, c. 4, s. 49.

Adjourn-
ments

50.—(1) The court may, from time to time, adjourn a trial or hearing but, where the defendant is in custody, an adjournment shall not be for a period longer than eight days without the consent of the defendant.

Early
resumption

(2) A trial or hearing that is adjourned for a period may be resumed before the expiration of the period with the consent of the defendant and the prosecutor. 1979, c. 4, s. 50.

Appearance
by defendant

51.—(1) A defendant may appear and act personally or by counsel or agent.

Appearance
by
corporation

(2) A defendant that is a corporation shall appear and act by counsel or agent.

Exclusion
of agents

(3) The court may bar any person from appearing as an agent who is not a barrister and solicitor entitled to practise in Ontario if the court finds that the person is not competent properly to represent or advise the person for whom he

Sec. 54 (3)

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appears as agent or does not understand and comply with the duties and responsibilities of an agent. 1979, c. 4, s. 51.

52. Notwithstanding that a defendant appears by counsel or agent, the court may order the defendant to attend personally, and, where it appears to be necessary to do so, may issue a summons in the prescribed form. 1979, c. 4, s. 52.

Compelling
attendance of
defendant

53.—(1) The court may cause the defendant to be removed and to be kept out of court,

Excluding
defendant
from
hearing

(a) when he misconducts himself by interrupting the proceedings so that to continue in his presence would not be feasible; or

(b) where, during the trial of an issue as to whether the defendant is, because of mental disorder, unable to conduct his defence, the court is satisfied that failure to do so might have an adverse effect on the mental health of the defendant.

(2) The court may exclude the public or any member of the public from a hearing where, in the opinion of the court, it is necessary to do so,

Excluding
public from
hearing

(a) for the maintenance of order in the courtroom;

(b) to protect the reputation of a minor; or

(c) to remove an influence that might affect the testimony of a witness.

(3) Where the court considers it necessary to do so to protect the reputation of a minor, the court may make an order prohibiting the publication or broadcast of the identity of the minor or of the evidence or any part of the evidence taken at the hearing. 1979, c. 4, s. 53.

Prohibition
of publication
of evidence

54.—(1) Where the defendant appears for a hearing and the prosecutor, having had due notice, does not appear, the court may dismiss the charge or may adjourn the hearing to another time upon such terms as it considers proper.

Failure of
prosecutor
to appear

(2) Where the prosecutor does not appear at the time and place appointed for the resumption of an adjourned hearing under subsection (1), the court may dismiss the charge.

Idem

(3) Where a hearing is adjourned under subsection (1) or a charge is dismissed under subsection (2), the court may make an order under section 61 for the payment of costs.

Costs

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Sec. 54 (4)

Written
order of
dismissal

(4) Where a charge is dismissed under subsection (1) or (2), the court may, if requested by the defendant, draw up an order of dismissal stating the grounds therefor and shall give the defendant a certified copy of the order of dismissal which is, without further proof, a bar to any subsequent proceedings against the defendant in respect of the same cause. 1979, c. 4, s. 54.

Ex parte
conviction

55.—(1) Where a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, a notice of trial was given under Part I or II, an undertaking to appear was given or a recognizance to appear was entered into, as the case may be, or where the defendant does not appear upon the resumption of a hearing that has been adjourned, the court.

- (a) may proceed *ex parte* to hear and determine the proceedings in the absence of the defendant;
- (b) may, if it thinks fit, adjourn the hearing and issue a summons to appear or issue a warrant in the prescribed form for the arrest of the defendant; or
- (c) may, where the defendant does not appear in response to the summons or warrant on the date to which the hearing is adjourned, proceed under clause (a) or (b).

Where
convicted
ex parte

(2) Where, the court proceeds under clause (1) (a), no proceeding arising out of the failure of the defendant to appear at the time and place appointed for the hearing or for the resumption of the hearing shall be instituted or if instituted shall be proceeded with, except with the consent of the Attorney General or his agent. 1979, c. 4, s. 55.

Included
offences

56. Where the offence as charged includes another offence, the defendant may be convicted of an offence so included that is proved, notwithstanding that the whole offence charged is not proved. 1979, c. 4, s. 56, *revised*.

Sentencing

Pre-sentence
report

57.—(1) Where a defendant is convicted of an offence in a proceeding commenced by information, the court may direct a probation officer to prepare and file with the court a report in writing relating to the defendant for the purpose of assisting the court in imposing sentence.

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(2) Where a report is filed with the court under subsection (1), the clerk of the court shall cause a copy of the report to be provided to the defendant or his counsel or agent and to the prosecutor. 1979, c. 4, s. 57.

Service

58.—(1) Where a defendant who appears is convicted of an offence, the court shall give the prosecutor and the counsel or agent for the defendant an opportunity to make submissions as to sentence and, where the defendant has no counsel or agent, the court shall ask him if he has anything to say before sentence is passed upon him.

Submissions
as to
sentence

(2) The omission to comply with subsection (1) does not affect the validity of the proceeding.

Omission
to comply

(3) Where a defendant is convicted of an offence, the court may make such inquiries, on oath or otherwise, of and concerning the defendant as it considers desirable, including his economic circumstances, but the defendant shall not be compelled to answer.

Inquiries
by court

(4) A certificate setting out with reasonable particularity the finding of guilt or acquittal or conviction and sentence in Canada of a person signed by,

Proof of
previous
conviction

(a) the person who made the adjudication; or

(b) the clerk of the court in which the adjudication was made.

is, upon the court being satisfied that the defendant is the person referred to in the certificate, admissible in evidence and is *prima facie* proof of the facts stated therein without proof of the signature or the official character of the person appearing to have signed the certificate. 1979, c. 4, s. 58.

59. In determining the sentence to be imposed on a person convicted of an offence, the justice may take into account any time spent in custody by the person as a result of the offence. 1979, c. 4, s. 59.

Time spent
in custody
considered

60.—(1) No penalty prescribed for an offence is a minimum penalty unless it is specifically declared to be a minimum.

Provision
for
minimum
penalty

(2) Notwithstanding that the provision that creates the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or

Relief
against
minimum
fine

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Sec. 60 (2)

otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence.

Idem, re
imprison-
ment

(3) Where a minimum penalty is prescribed for an offence and the minimum penalty includes imprisonment, the court may, notwithstanding the prescribed penalty, impose a fine of not more than \$2,000 in lieu of imprisonment. 1979, c. 4, s. 60.

Fixed
costs on
conviction

61.—(1) Upon conviction, the defendant is liable to pay to the court an amount by way of costs that is fixed by the regulations.

Costs
respecting
witnesses

(2) The court may, in its discretion, order costs towards fees and expenses reasonably incurred by or on behalf of witnesses in amounts not exceeding the maximum fixed by the regulations, to be paid,

(a) to the court or prosecutor by the defendant; or

(b) to the defendant by the person who laid the information or issued the certificate, as the case may be,

but where the proceeding is commenced by means of a certificate, the total of such costs shall not exceed \$100.

Costs
collectable
as a fine

(3) Costs payable under this section shall be deemed to be a fine for the purpose of enforcing payment. 1979, c. 4, s. 61.

General
penalty

62. Except where otherwise expressly provided by law, every person who is convicted of an offence is liable to a fine of not more than \$2,000. 1979, c. 4, s. 62 (1), *revised*.

Minute of
conviction

63. Where a court convicts a defendant or dismisses a charge, a minute of the dismissal or conviction and sentence shall be made by the court, and, upon request by the defendant or the prosecutor or by the Attorney General or his agent, the court shall cause a copy thereof certified by the clerk of the court to be delivered to the person making the request. 1979, c. 4, s. 63.

Time when
imprison-
ment
starts

64.—(1) The term of imprisonment imposed by sentence shall, unless otherwise directed in the sentence, commence on the day on which the convicted person is taken into custody thereunder, but no time during which the convicted person is imprisoned or out on bail before sentence shall be reckoned as part of the term of imprisonment to which he is sentenced.

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(2) Where the court imposes imprisonment, the court may order custody to commence on a day not later than thirty days after the day of sentencing. 1979, c. 4, s. 64. Idem

65. Where a person is subject to more than one term of imprisonment at the same time, the terms shall be served consecutively except in so far as the court has ordered a term to be served concurrently with any other term of imprisonment. 1979, c. 4, s. 65. Sentences consecutive

66.—(1) A warrant of committal is sufficient authority, Authority of warrant

(a) for the conveyance of the prisoner in custody for the purpose of committal under the warrant; and

(b) for the reception and detention of the prisoner by keepers of prisons in accordance with the terms of the warrant.

(2) A person to whom a warrant of committal is directed shall convey the prisoner to the correctional institution named in the warrant. Conveyance of prisoner

(3) A sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced. 1979, c. 4, s. 66. Prisoner subject to rules of institution

67.—(1) A fine becomes due and payable fifteen days after its imposition. When fine due

(2) Where the court imposes a fine, the court shall ask the defendant if he wishes an extension of the time for payment of the fine. Extension of time for payment of a fine

(3) Where the defendant requests an extension of the time for payment of the fine, the court may make such inquiries, on oath or otherwise, of and concerning the defendant as the court considers desirable, but the defendant shall not be compelled to answer. Inquiries

(4) Unless the court finds that the request for extension of time is not made in good faith or that the extension would likely be used to evade payment, the court shall extend the time for payment by ordering periodic payments or otherwise. Granting of extension

(5) Where a fine is imposed in the absence of the defendant, the clerk of the court shall give the defendant notice of the fine and its due date and of his right to apply for an extension of the time for payment under subsection (6). Notice where convicted in absentia

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Further
application
for
extension

(6) The defendant may, at any time by application in the prescribed form filed in the office of the court, request an extension or further extension of time for payment of a fine and the application shall be determined by a justice and the justice has the same powers in respect of the application as the court has under subsections (3) and (4). 1979, c. 4, s. 67.

Regulation
for work
credits for
fines

68. The Lieutenant Governor in Council may make regulations establishing a program to permit the payment of fines by means of credits for work performed, and, for the purpose and without restricting the generality of the foregoing may,

- (a) prescribe classes of work and the conditions under which they are to be performed;
- (b) prescribe a system of credits;
- (c) provide for any matter necessary for the effective administration of the program,

and any regulation may limit its application to any part or parts of Ontario. 1979, c. 4, s. 68.

Civil
enforcement
of fines

69.—(1) When the payment of a fine is in default, the clerk of the court may complete a certificate in the prescribed form as to the imposition of the fine and the amount remaining unpaid and file the certificate in a court of competent jurisdiction and upon filing, the certificate shall be deemed to be an order or judgement of that court for the purposes of enforcement.

Limitation

(2) A certificate shall not be filed under subsection (1) after two years after the default in respect of which it is issued.

Certificate of
discharge

(3) Where a certificate has been filed under subsection (1) and the fine is fully paid, the clerk shall file a certificate of payment upon which the certificate of default is discharged and, where a writ of execution has been filed with the sheriff, the clerk shall file a certificate of payment with the sheriff, upon which the writ is cancelled. 1979, c. 4, s. 69.

Default

70.—(1) The payment of a fine is in default when any part of the fine is due and unpaid for fifteen days or more.

Order on
default

(2) Where a justice is satisfied that payment of a fine is in default, the justice,

- (a) shall order that any permit, licence, registration or privilege in respect of which a suspension is author-

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ized by or under any Act for non-payment of the fine be suspended, not renewed or not issued until the fine is paid; and

- (b) may direct the clerk of the court to proceed with civil enforcement under section 69.

(3) A justice may issue a warrant in the prescribed form for the committal of the defendant where,

Imprisonment for non-payment of fine

- (a) an order or direction under clause (2) (a) has not resulted in payment within a time that is reasonable in the circumstances;
- (b) all other reasonable methods of collecting the fine have been tried and failed or, in the opinion of the justice, would not likely result in payment within a reasonable time in the circumstances; and
- (c) the defendant has been given fifteen days notice of the intent to issue a warrant and has had an opportunity to be heard.

(4) In exceptional circumstances where, in the opinion of the court imposing the fine, to proceed under subsection (3) would defeat the ends of justice, the court may,

Provision on conviction for imprisonment in default

- (a) order that no warrant of committal be issued under subsection (3); or
- (b) order imprisonment in default of payment of the fine and that no extension of time for payment be granted.

(5) Imprisonment under a warrant issued under subsection (3) or (4) shall be for three days, plus one day for each \$25 or part thereof that is in default, subject to a maximum period of,

Term of imprisonment

- (a) ninety days; or
- (b) half of the maximum imprisonment, if any, provided for the offence,

whichever is the greater.

(6) Any payment made after a warrant is issued under subsection (3) or (4) shall reduce the term by the number of days that is in the same proportion to the number of days in the term as the amount paid bears to the amount in default and

Effect of payments

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no amount offered in part payment of a fine shall be accepted unless it is sufficient to secure reduction of sentence of one day, or a multiple thereof. 1979, c. 4, s. 70, *revised*.

Suspension
of fine on
conditions

71. Where an Act provides that a fine may be suspended subject to the performance of a condition.

- (a) the period of suspension shall be fixed by the court and shall be for not more than one year;
- (b) the court shall provide in its order of suspension the method of proving the performance of the condition;
- (c) the suspension is in addition to and not in lieu of any other power of the court in respect of the fine; and
- (d) the fine is not in default until fifteen days have elapsed after notice that the period of suspension has expired is given to the defendant. 1979, c. 4, s. 71.

Probation
order

72.—(1) Where a defendant is convicted of an offence in a proceeding commenced by information, the court may, having regard to the age, character and background of the defendant, the nature of the offence and the circumstances surrounding its commission.

- (a) suspend the passing of sentence and direct that the defendant comply with the conditions prescribed in a probation order;
- (b) in addition to fining the defendant or sentencing him to imprisonment, whether in default of payment of a fine or otherwise, direct that the defendant comply with the conditions prescribed in a probation order; or
- (c) where it imposes a sentence of imprisonment on the defendant, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittently at such times as are specified in the order and direct that the defendant, at all times when he is not in confinement pursuant to such order, comply with the conditions prescribed in a probation order.

Statutory
conditions
of order

(2) A probation order shall be deemed to contain the conditions that,

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- (a) the defendant not commit the same or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment;
 - (b) the defendant appear before the court as and when required; and
 - (c) the defendant notify the court of any change in his address.
- (3) In addition to the conditions set out in subsection (2), the court may prescribe the following conditions in a probation order, Conditions imposed by court
- (a) that the defendant satisfy any compensation or restitution that is required or authorized by an Act;
 - (b) with the consent of the defendant and where the conviction is of an offence that is punishable by imprisonment, that the defendant perform a community service as set out in the order;
 - (c) where the conviction is of an offence, punishable by imprisonment, such other conditions relating to the circumstances of the offence and of the defendant that contributed to the commission of the offence as the court considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant; or
 - (d) where considered necessary for the purpose of implementing the conditions of the probation order, that the defendant report to a responsible person designated by the court and, in addition, where the circumstances warrant it, that the defendant be under the supervision of the person to whom he is required to report.
- (4) A probation order shall be in the prescribed form and the court that makes the order shall specify therein the period for which it is to remain in force, which shall not be for more than two years from the date when the order takes effect. Form of order
- (5) Where the court makes a probation order, it shall cause a copy of the order and a copy of section 75 to be given to the defendant. Notice of order
- (6) The Lieutenant Governor in Council may make regulations governing restitution, compensation and community Regulations for community service orders

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service orders, including their terms and conditions. 1979, c. 4, s. 72.

When order
comes into
force

73.—(1) A probation order comes into force,

- (a) on the date on which the order is made; or
- (b) where the defendant is sentenced to imprisonment other than a sentence to be served intermittently, upon the expiration of that sentence.

Continuation
in force

(2) Subject to section 75, where a defendant who is bound by a probation order is convicted of an offence or is imprisoned in default of payment of a fine, the order continues in force except in so far as the sentence or imprisonment renders it impossible for the defendant to comply for the time being with the order. 1979, c. 4, s. 73.

Variation of
probation
order

74. The court may, at any time upon the application of the defendant or prosecutor with notice to the other, after a hearing or, with the consent of the parties, without a hearing,

- (a) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in circumstances;
- (b) relieve the defendant, either absolutely or upon such terms or for such period as the court considers desirable, of compliance with any condition described in any of the clauses in subsection 72 (3) that is prescribed in the order; or
- (c) terminate the order or decrease the period for which the probation order is to remain in force,

and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order, inform the defendant of its action and give him a copy of the order so endorsed. 1979, c. 4, s. 74.

Breach of
probation
order

75. Where a defendant who is bound by a probation order is convicted of an offence constituting a breach of condition of the order and,

- (a) the time within which he may appeal or apply for leave to appeal against that conviction has expired and he has not taken an appeal or applied for leave to appeal;

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- (b) he has taken an appeal or applied for leave to appeal against the conviction and the appeal or application for leave has been dismissed or abandoned; or
- (c) he has given written notice to the court that convicted him that he elects not to appeal,

or where the defendant otherwise wilfully fails or refuses to comply with the order, he is guilty of an offence and upon conviction the court may,

- (d) impose a fine of not more than \$1,000 or imprisonment for a term of not more than thirty days, or both, and in lieu of or in addition to the penalty, continue the probation order with such changes or additions and for such extended term, not exceeding an additional year, as the court considers reasonable; or
- (e) where the justice presiding is the justice who made the original order, in lieu of imposing the penalty under clause (d), revoke the probation order and impose the sentence the passing of which was suspended upon the making of the probation order. 1979, c. 4, s. 75.

PART V

GENERAL PROVISIONS

76.—(1) Proceedings shall not be commenced after the expiration of any limitation period prescribed by or under any Act for the offence or, where no limitation period is prescribed, after six months after the date on which the offence was, or is alleged to have been, committed. 1984, c. 11, s. 206(1). Limitation

(2) A limitation period may be extended by a justice with the consent of the defendant. 1979, c. 4, s. 76. Extension

77.—(1) Every person is a party to an offence who, Parties to offence

- (a) actually commits it,
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

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Common
purpose

(2) Where two or more persons from an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to the offence. 1979, c. 4, s. 77.

Counselling

78.—(1) Where a person counsels or procures another person to be a party to an offence and that other person is afterwards a party to the offence, the person who counselled or procured is a party to the offence, notwithstanding that the offence was committed in a way different from that which was counselled or procured.

Idem

(2) Every person who counsels or procures another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling or procuring that the person who counselled or procured knew or ought to have known was likely to be committed in consequence of the counselling or procuring. 1979, c. 4, s. 78.

Computation
of age

79. In the absence of other evidence, or by way of corroboration of other evidence, a justice may infer the age of a person from his appearance. 1979, c. 4, s. 79.

Common
law
defences

80. Every rule and principle of the common law that renders any circumstances a justification or excuse for an act or a defence to a charge continues in force and applies in respect of offences, except in so far as they are altered by or inconsistent with this or any other Act. 1979, c. 4, s. 80.

Ignorance
of the law

81. Ignorance of the law by a person who commits an offence is not an excuse for committing the offence. 1979, c. 4, s. 81.

Counsel or
agent

82. A defendant may act by his counsel or agent. 1979, c. 4, s. 82.

Recording of
evidence

83.—(1) Proceedings in which evidence is taken shall be recorded.

Evidence
under oath

(2) Evidence under this Act shall be taken under oath, except as otherwise provided by law. 1979, c. 4, s. 83.

Interpreters

84.—(1) A justice may authorize a person to act as interpreter in a proceeding before him where the person swears the prescribed oath and, in the opinion of the justice, is competent.

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(2) A judge may authorize a person to act as interpreter in proceedings under this Act where he swears the prescribed oath and, in the opinion of the judge is competent and likely to be readily available. 1979, c. 4, s. 84. Idem

85. Any time prescribed by this Act or the regulations made thereunder or by the rules of the court for doing any thing other than commencing or recommencing proceedings may be extended by the court in which the proceeding is conducted, whether or not the prescribed time has expired. 1979, c. 4, s. 85. Extension of time

86. Every person who makes an assertion of fact in a statement or entry in a document of form for use under this Act knowing that the assertion is false is guilty of an offence and on conviction is liable to a fine of not more than \$1,000. 1979, c. 4, s. 86. Penalty for false statements

87.—(1) Except as otherwise provided by this Act or the rules of the court, any notice or document required or authorized to be given or delivered under this Act or the rules of the court is sufficiently given or delivered if delivered, whether personally or by mail. Delivery

(2) Where a notice or document that is required or authorized to be given or delivered to a person under this Act is mailed to the person at his last known address appearing on the records of the court in the proceeding, there is a rebuttable presumption that the notice or document is delivered to the person. 1979, c. 4, s. 87. Idem

88. No civil remedy for an act or omission is suspended or affected for the reason that the act or omission is an offence. 1979, c. 4, s. 88. Civil remedies preserved

89. Any action authorized or required by this Act is not invalid for the reason only that the action was taken on a non-judicial day. 1979, c. 4, s. 89. Process on holidays

90.—(1) The validity of any proceeding is not affected by, Irregularities in form

- (a) any irregularity or defect in the substance or form of the summons, warrant, offence notice, parking infraction notice, undertaking to appear or recognizance; or
- (b) any variance between the charge set out in the summons, warrant, parking infraction notice, offence notice undertaking to appear or recognizance and the charge set out in the information or certificate.

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Adjournment
to meet
irregularities

(2) Where it appears to the court that the defendant has been misled by any irregularity, defect or variance mentioned in subsection (1), the court may adjourn the hearing and may make such order as the court considers appropriate, including an order under section 61 for the payment of costs. 1979, c. 4, s. 90.

Regulations

91. The Lieutenant Governor in Council may make regulations,

R.S.O. 1980,
c. 198

- (a) prescribing any matter referred to in this Act as prescribed by the regulations;
- (b) prescribing the form of certificate as to ownership of a motor vehicle given by the Registrar under subsection 184 (3) of the *Highway Traffic Act* for the purpose of proceedings under this Act;
- (c) providing for the extension of times prescribed by or under this Act or the rules in the event of a disruption in postal services;
- (d) requiring the payment of fees upon the filing of anything required or permitted to be filed under this Act or the rules and fixing the amounts thereof, and providing for the waiver of the payment of a fee by a justice, or by a judge under Part VI, in such circumstances and under such conditions as are set out in the regulations;
- (e) fixing costs payable upon conviction and referred to in subsection 61 (1);
- (f) fixing the items in respect of which costs may be awarded under subsection 61 (2) and prescribing the maximum amounts that may be awarded in respect of each item. 1979, c. 4, s. 91.

PART V-A

YOUNG PERSONS

91a. In this Part,

- (a) “parent”, when used with reference to a young person, includes an adult with whom the young person ordinarily resides;
- (b) “young person” means a person who is or, in the absence of evidence to the contrary, appears to be,

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- (i) twelve years of age or more, but
- (ii) under sixteen years of age,

and includes a person sixteen years of age or more charged with having committed an offence while he was twelve years of age or more but under sixteen years of age.

91b. No person shall be convicted of an offence committed while he was under twelve years of age.

91c. A proceeding commenced against a young person by certificate of offence shall not be initiated by an offence notice under clause 3(2)(a).

91d.—(1) Where a summons is served upon a young person or a young person is released on a recognizance under this Act, the provincial offences officer, in the case of a summons, or the officer in charge, in the case of a recognizance, shall as soon as practicable give notice to a parent of the young person by delivering a copy of the summons or recognizance to the parent.

(2) Where notice has not been given under subsection (1) and no person to whom notice could have been given appears with the young person, the court may,

- (a) adjourn the hearing to another time to permit notice to be given; or
- (b) dispense with notice.

(3) Failure to give notice to a parent under subsection (1) does not in itself invalidate the proceedings against the young person.

91e.—(1) Notwithstanding subsection 12(1), where a young person is found guilty of an offence in proceedings commenced by certificate, the court may,

- (a) convict the young person and,
 - (i) order the young person to pay a fine not exceeding the set fine that would be payable for the offence by an adult, the maximum fine prescribed for the offence, or \$300, whichever is the least, or

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- (ii) suspend the passing of sentence and direct that the young person comply with the conditions prescribed in a probation order; or

- (b) discharge the young person absolutely.

(2) Section 72 applies with necessary modifications to a probation order made under subclause (1)(a)(ii), in the same manner as if the proceedings were commenced by information, except that the probation order shall not remain in force for more than ninety days from the date when it takes effect.

(3) Subsection 12(2) applies with necessary modifications where a young person is convicted of an offence in proceedings initiated by summons, in the same manner as if the proceedings were initiated by offence notice.

91f.—(1) Subject to subsection 53(1) and subsection (2), a young person shall be present in court during the whole of his trial.

(2) The court may permit a young person to be absent during the whole or any part of his trial, on such conditions as the court considers proper.

(3) Sections 43 and 55 do not apply to a young person who is a defendant.

(4) Where a young person who is a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, an undertaking to appear was given or a recognizance to appear was entered into, as the case may be, or where the young person does not appear upon the resumption of a hearing that has been adjourned, the court may adjourn the hearing and issue a summons to appear or issue a warrant in the prescribed form for the arrest of the young person.

(5) Where a young person does not attend personally in response to a summons issued under section 52 and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that the summons was served, the court may adjourn the hearing and issue a further summons or issue a warrant in the prescribed form for the arrest of the young person.

91g.—(1) No person shall publish by any means a report,

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- (a) of an offence committed or alleged to have been committed by a young person; or
- (b) of a hearing, adjudication, sentence or appeal concerning a young person who committed or is alleged to have committed an offence,

in which the name of or any information serving to identify the young person is disclosed.

(2) Every person who contravenes subsection (1) and every director, officer or employee of a corporation who authorizes, permits or acquiesces in a contravention of subsection (1) by the corporation is guilty of an offence and is liable on conviction to a fine of not more than \$10,000.

91h.—(1) Section 57 applies with necessary modifications where a young person is convicted of an offence in a proceeding commenced by certificate of offence, in the same manner as if the proceeding were commenced by information.

(2) Where a young person who is bound by a probation order is convicted of an offence under section 75 and the court is considering imposing a sentence of imprisonment, the court shall direct a probation officer to prepare and file with the court a report in writing relating to the defendant for the purpose of assisting the court in imposing sentence, and the clerk of the court shall cause a copy of the report to be provided to the defendant or his counsel or agent and to the prosecutor.

91i.—(1) Notwithstanding the provisions of this or any other Act, no young person shall be sentenced.

- (a) to be imprisoned, except under clause 75(d); or
- (b) to pay a fine exceeding \$1,000.

(2) Where a young person is found guilty of an offence in proceedings commenced by information, the court may,

- (a) convict the young person and,
 - (i) order the young person to pay a fine not exceeding the maximum prescribed for the offence or \$1,000, whichever is less, or
 - (ii) suspend the passing of sentence and direct that the young person comply with the conditions prescribed in a probation order; or

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(b) discharge the young person absolutely.

(3) A probation order made under subclause (2)(a)(ii) shall not remain in force for more than one year from the date when it takes effect.

91j.—(1) No warrant of committal shall be issued against a young person under section 70.

(2) Where it would be appropriate, but for subsection (1), to issue a warrant against a young person under subsection 70(3) or (4), a judge may direct that the young person comply with the conditions prescribed in a probation order, where the young person has been given fifteen days notice of the intent to make a probation order and has had an opportunity to be heard.

(3) A probation order made under subsection (2) shall not remain in force for more than ninety days from the date when it takes effect.

91k. Where a young person is sentenced to a term of imprisonment for breach of probation under clause 75(d), the term of imprisonment shall be served in a place of open custody designated under Section 24 of the *Young Offenders Act* (Canada.).

91l. In a proceeding under this Act, a parent's testimony as to a young person's age and any other evidence of a young person's age that the court considers credible or trustworthy in the circumstances are admissible.

91m. Where the defendant is a young person, an appeal under subsection 118(1) shall be the county or district court of the county or district in which the adjudication was made, but the procedures and the powers of the court and any appeal from the judgment of the court shall be the same as if the appeal were to the provincial court (criminal division).

91n. No person shall exercise an authority under this or any other Act to arrest a young person without warrant unless the person has reasonable and probable grounds to believe that it is necessary in the public interest to do so in order to,

- (a) establish the young person's identity; or
- (b) prevent the continuation or repetition of an offence that constitutes a serious danger to the young person or to the person or property of another.

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91o.—(1) Section 133 does not apply to a young person who has been arrested.

(2) Where a police officer acting under a warrant or other power of arrest arrests a young person, the police officer shall, as soon as is practicable, release the young person from custody unconditionally or after serving him with a summons unless he has reasonable and probable grounds to believe that it is necessary in the public interest for the young person to be detained in order to,

- (a) establish the young person's identity; or
- (b) prevent the continuation or repetition of an offence that constitutes a serious danger to the person or the person or property of another.

(3) Where a young person is not released from custody under subsection (2), the police officer shall deliver him to the officer in charge who shall, where in his opinion the conditions set out in clause (2)(a) or (b) do not or no longer exist, release the young person.

- (a) unconditionally;
- (b) upon serving him with a summons; or
- (c) upon his entering into a recognizance in the prescribed form without sureties conditioned for his appearance in court.

(4) Where the officer in charge does not release the young person under subsection (3), the officer in charge shall as soon as possible notify a parent of the young person by advising the parent, orally or in writing, of the young person's arrest, the reason for the arrest and the place of detention.

(5) Sections 134 and 135 apply with necessary modifications to the release of a young person from custody under this section.

(6) No young person who is detained under section 134 shall be detained in any part of a place in which an adult who has been charged with or convicted of an offence is detained unless a justice so authorizes, on being satisfied that,

- (a) the young person cannot, having regard to the young person's own safety or the safety of others, be detained in a place of temporary detention for young persons; or

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- (b) no place of temporary detention for young persons is available within a reasonable distance.

(7) Wherever practicable, a young person who is detained in custody shall be detained in a place of temporary detention under subsection (7)(1) of the *Young Offenders Act* (Canada).

91p. The functions of a justice with respect to a defendant who is a young person shall be performed only by a judge, except under Parts III and VII.

91q. This Part applies to proceedings commenced after this Part comes into force. 1983, c. 80, s. 1

PART VI

APPEALS AND REVIEW

Interpre-
tation

92. In this Part,

- (a) "counsel" when used in respect of proceedings in a provincial court (criminal division) includes an agent;
- (b) "court" means the court to which an appeal is or may be taken under this Part;
- (c) "judge" means a judge of the court to which an appeal is or may be taken under this Part;
- (d) "rules" means the rules made under section 123;
- (e) "sentence" includes any order or disposition consequent upon a conviction and an order as to costs. 1979, c. 4, s. 92 (1).

Custody
pending
appeal

93. A defendant who appeals shall, if he is in custody, remain in custody, but a judge may order his release upon any of the conditions set out in subsection 134 (2). 1979, c. 4, s. 94.

Payment of
fine before
appeal

94.—(1) A notice of appeal by a defendant shall not be accepted for filing if the defendant has not paid in full the fine imposed by the decision appealed from.

Exception
with recogni-
zance

(2) A judge may waive compliance with subsection (1) and order that the appellant enter into a recognizance to appear on the appeal, and the recognizance shall be in such amount, with or without sureties, as the judge directs. 1979, c. 4, s. 95.

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95. The filing of a notice of appeal does not stay the conviction unless a judge so orders. 1979, c. 4, s. 96.

Stay

96.—(1) Where an appellant is in custody pending the hearing of the appeal and the hearing of the appeal has not commenced within thirty days from the day on which notice of the appeal was given, the person having custody of the appellant shall apply to a judge to fix a date for the hearing of the appeal.

Fixing of
date where
appellant
in custody

(2) Upon receiving an application under subsection (1), the judge shall, after giving the prosecutor a reasonable opportunity to be heard, fix a date for the hearing of the appeal and give such directions as he thinks appropriate for expediting the hearing of the appeal. 1979, c. 4, s. 97.

Idem

97. A person does not waive his right of appeal by reason only that he pays the fine or complies with any order imposed upon conviction. 1979, c. 4, s. 98.

Payment
of fine
not waiver

98. Where a notice of appeal has been filed, the clerk of the appeal court shall notify the clerk of the provincial offences court appealed from of the appeal and, upon receipt of the notification, the clerk of the provincial offences court shall transmit the order appealed from and transmit or transfer custody of all other material in his possession or control relevant to the proceedings to the clerk of the appeal court to be kept with the records of the appeal court. 1979, c. 4, s. 99.

Transmittal
of material

APPEALS UNDER PART III

99.—(1) Where a proceeding is commenced by information under Part III, the defendant or the prosecutor or the Attorney General by way of intervention may appeal from a conviction or dismissal or from a finding as to ability, because of mental disorder, to conduct a defence or as to sentence.

Appeal

(2) An appeal under subsection (1) shall be,

Appeal
court

- (a) where the appeal is from the decision of a justice of the peace, to the provincial court (criminal division) of the county or district in which the adjudication was made; or
- (b) where the appeal is from the decision of a provincial judge, to the county or district court of the county or district in which the adjudication was made.

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Notice of
appeal

(3) The appellant shall give notice of appeal in such manner and within such period as is provided by the rules. 1979, c. 4, s. 93.

Powers
of court

100.—(1) The court may, where it considers it to be in the interests of justice,

- (a) order the production of any writing, exhibit or other thing relevant to the appeal;
- (b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,
 - (i) to attend and be examined before the court, or
 - (ii) to be examined in the manner provided by the rules before a judge of the court, or before any officer of the court or justice of the peace or other person appointed by the court for the purpose;
- (c) admit, as evidence, an examination that is taken under subclause (b) (ii);
- (d) receive the evidence, if tendered, of any witness;
- (e) order that any question arising on the appeal that,
 - (i) involves prolonged examination of writings or accounts, or scientific investigation, and
 - (ii) cannot in the opinion of the court conveniently be inquired into before the court,be referred for inquiry and report, in the manner provided by the rules, to a special commissioner appointed by the court; and
- (f) act upon the report of a commissioner who is appointed under clause (e) in so far as the court thinks fit to do so.

Right of
appellant

(2) In proceedings under this section, the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under clause (1) (e), are entitled to be present during the inquiry and to adduce evidence and to be heard. 1979, c. 4, s. 100.

Sec. 103 (1)

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101.—(1) An appellant or respondent may appear and act personally or by counsel. Right to counsel

(2) An appellant or respondent who is in custody as a result of the decision appealed from is entitled to be present at the hearing of the appeal. Attendance while in custody

(3) The power of a court to impose sentence may be exercised notwithstanding that the appellant or respondent is not present. 1979, c. 4, s. 101, *revised*. Sentencing in absence

102. An appellant or respondent may present his case on appeal and his argument in writing instead of orally, and the court shall consider any case or argument so presented. 1979, c. 4, s. 102, *revised*. Written argument

103.—(1) On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order, Powers on appeal against conviction

(a) may allow the appeal where it is of the opinion that,

- (i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
- (iii) on any ground, there was a miscarriage of justice; or

(b) may dismiss the appeal where,

- (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,
- (ii) the appeal is not decided in favour of the appellant on any ground mentioned in clause (a), or
- (iii) notwithstanding that the court is of the opinion that on any ground mentioned in sub-clause (a) (ii) the appeal might be decided in favour of the appellant, it is of the opinion

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that no substantial wrong or miscarriage of justice has occurred.

Idem

(2) Where the court allows an appeal under clause (1) (a), it shall,

(a) where the appeal is from a conviction,

(i) direct a finding of acquittal to be entered, or

(ii) order a new trial; or

(b) where the appeal is from a finding as to the ability, because of mental disorder, to conduct a defence, order a new trial, subject to section 45.

Idem

(3) Where the court dismisses an appeal under clause (1) (b), it may substitute the decision that in its opinion should have been made and affirm the sentence passed by the trial court or to impose a sentence that is warranted in law. 1979, c. 4, s. 103.

Powers
on appeal
against
acquittal

104. Where an appeal is from an acquittal, the court may by order,

(a) dismiss the appeal; or

(b) allow the appeal, set aside the finding and,

(i) order a new trial, or

(ii) enter a finding of guilt with respect to the offence of which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law. 1979, c. 4, s. 104, *revised*.

Appeal
against
sentence

105.—(1) Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,

(a) dismiss the appeal; or

(b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,

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and, in making any order under clause (b), the court may take into account any time spent in custody by the defendant as a result of the offence.

(2) A judgment of a court that varies a sentence has the same force and effect as if it were a sentence passed by the trial court. 1979, c. 4, s. 105.

Variance
of
sentence

106. Where one sentence is passed upon a finding of guilt on two or more counts, the sentence is good if any of the counts would have justified the sentence. 1979, c. 4, s. 106.

One sentence
on more than
one count

107.—(1) Judgment shall not be given in favour of an appellant based on any alleged defect in the substance or form of an information, certificate or process or any variance between the information, certificate or process and the evidence adduced at trial unless it is shown that objection was taken at the trial and that, in the case of a variance, an adjournment of the trial was refused notwithstanding that the variance had misled the appellant.

Appeal
based on
defect in
informa-
tion or
process

(2) Where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect. 1979, c. 4, s. 107.

Idem

108. Where a court exercises any of the powers conferred by sections 100 to 107, it may make any order, in addition, that justice requires. 1979, c. 4, s. 108.

Additional
orders

109.—(1) Where a court orders a new trial, it shall be held in a provincial offences court presided over by a justice other than the justice who tried the defendant in the first instance unless the appeal court directs that the new trial be held before the justice who tried the defendant in the first instance.

New trial

(2) Where a court orders a new trial, it may make such order for the release or detention of the appellant pending such trial as may be made by a justice under subsection 134 (2) and the order may be enforced in the same manner as if it had been made by a justice under that subsection. 1979, c. 4, s. 109.

Order
for
release

110.—(1) Where, because of the condition of the record of the trial in the trial court or for any other reason, the court, upon application of the appellant or respondent, is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a new trial in the court, the court may order that the appeal shall be heard

Trial
de novo

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by way of a new trial in the court in accordance with the rules, and for this purpose this Act applies, with necessary modifications, in the same manner as to a proceeding in a provincial offences court.

Evidence

(2) The court may, for the purpose of hearing and determining an appeal under subsection (1), permit the evidence of any witness taken before the trial court to be read if that evidence has been authenticated and if,

- (a) the appellant and respondent consent;
- (b) the court is satisfied that the attendance of the witness cannot reasonably be obtained; or
- (c) by reason of the formal nature of the evidence or otherwise the court is satisfied that the opposite party will not be prejudiced,

and any evidence that is read under the authority of this subsection has the same force and effect as if the witness had given the evidence before the court. 1979, c. 4, s. 110.

Dismissal or
abandonment

111. The court may, upon proof that notice of an appeal has been given and that,

- (a) the appellant has failed to comply with any order made under section 93 or 94 or with the conditions of any recognizance entered into under either of those sections; or
- (b) the appeal has not been proceeded with or has been abandoned,

order that the appeal be dismissed. 1979, c. 4, s. 111.

Costs

112.—(1) Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the court may make any order with respect to costs that it considers just and reasonable.

Payment

(2) Where the court orders the appellant or respondent to pay costs, the order shall direct that the costs be paid to the clerk of the trial court, to be paid by him to the person entitled to them, and shall fix the period within which the costs shall be paid.

Enforce-
ment

(3) Costs ordered to be paid under this section by a person other than a prosecutor acting on behalf of the Crown shall be

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deemed to be a fine for the purpose of enforcing its payment.
1979, c. 4, s. 112.

113. An order or judgment of the appeal court shall be implemented or enforced by the trial court and the clerk of the appeal court shall send to the clerk of the trial court the order and all writings relating thereto. 1979, c. 4, s. 113.

Implementa-
tion of
appeal court
order

114.—(1) A defendant or the prosecutor or the Attorney General by way of intervention may appeal from the judgment of the court to the Court of Appeal, with leave of a justice of appeal on special grounds, upon any question of law alone or as to sentence in accordance with the rules made under section 123.

Appeal to
Court of
Appeal

(2) No leave to appeal shall be granted under subsection (1) unless the justice of appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted. 1979, c. 4, s. 114.

Grounds
for leave

(3) No appeal or review lies from a decision on a motion for leave to appeal under subsection (1). 1984, c. 11, s. 206(2)

115. A defendant who appeals shall, if he is in custody, remain in custody, but a judge may order his release upon any of the conditions set out in subsection 134 (2). 1979, c. 4, s. 115.

Custody
pending
appeal

116. Where an application for leave to appeal is made, the Registrar of the Court of Appeal shall notify the clerk of the court appealed from of the application and, upon receipt of the notification, the clerk of the court shall transmit to the Registrar all the material forming the record including any other relevant material requested by a justice of appeal. 1979, c. 4, s. 116.

Transfer
of
record

117. Sections 97, 100, 101, 102, 103, 104, 105, 106, 107, 108 and 109, clause 111 (b) and section 112 apply, with necessary modifications, to appeals to the Court of Appeal under section 114. 1979, c. 4, s. 117.

Application
of ss. 97,
100-109,
111 (b), 112

APPEALS UNDER PARTS I AND II

118.—(1) A defendant or the prosecutor or the Attorney General by way of intervention is entitled to appeal an acquittal, conviction or sentence in a proceeding commenced by certificate under Part I or II and the appeal shall be to the pro-

Appeal

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vincial court (criminal division) of the county or district in which the adjudication was made.

Application
for appeal

(2) A notice of appeal shall be in the prescribed form and shall state the reasons why the appeal is taken and shall be filed with the clerk of the provincial court (criminal division) within fifteen days after the making of the decision appealed from, in accordance with the rules.

Notice of
hearing

(3) The clerk shall, as soon as is practicable, give a notice to the defendant and prosecutor of the time and place of the hearing of the appeal. 1979, c. 4, s. 118.

Conduct
of appeal

119.—(1) Upon an appeal, the court shall give the parties an opportunity to be heard for the purpose of determining the issues and may, where the circumstances warrant it, make such inquiries as are necessary to ensure that the issues are fully and effectively defined.

Review

(2) An appeal shall be conducted by means of a review in the provincial court (criminal division) of the county or district in which the adjudication was made.

Evidence

(3) In determining a review, the court may,

- (a) hear or rehear the recorded evidence or any part thereof and may require any party to provide a transcript of the evidence, or any part thereof, or to produce any further exhibit;
- (b) receive the evidence of any witness whether or not the witness gave evidence at the trial;
- (c) require the justice presiding at the trial to report in writing on any matter specified in the request; or
- (d) receive and act upon statements of agreed facts or admissions. 1979, c. 4, s. 119.

Dismissal
on abandon-
ment

120. Where an appeal has not been proceeded with or abandoned, the court may order that the appeal be dismissed. 1979, c. 4, s. 120.

Powers of
court on
appeal

121.—(1) Upon an appeal, the court may affirm, reverse or vary the decision appealed from or where, in the opinion of the court, it is necessary to do so to satisfy the ends of justice, direct a new trial.

New trial

(2) Where the court directs a new trial, it shall be held in the provincial offences court presided over by a justice other

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than the justice who tried the defendant in the first instance, but the appeal court may, with the consent of the parties to the appeal, direct that the new trial be held before the justice who tried the defendant in the first instance or before the judge who directs the new trial.

(3) Upon an appeal, the court may make an order under section 61 for the payment of costs incurred on the appeal, and subsection (3) thereof applies to the order in the same manner as to an order of a provincial offences court. 1979, c. 4, s. 121. Costs

122.—(1) An appeal lies from the judgment of the provincial court (criminal division) to the Court of Appeal, with leave of a justice of appeal, on special grounds, upon any question of law alone in accordance with the rules made under section 123. Appeal to Court of Appeal

(2) No leave to appeal shall be granted under subsection (1) unless the justice of appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted. Grounds for leave

(3) Upon an appeal under this section, the Court of Appeal may make any order with respect to costs that it considers just and reasonable. 1979, c. 4, s. 122. Costs

(4) No appeal or review lies from a decision on a motion for leave to appeal under subsection (1). 1984, c. 11, s. 206(3)

RULES FOR APPEALS

123. The Lieutenant Governor in Council may make rules of court not inconsistent with this or any other Act for the conduct of and governing practices and procedures on appeals in the provincial courts (criminal division), the county and district courts and the Court of Appeal under this Act, and respecting any matter arising from or incidental to such appeals. 1979, c. 4, s. 123. Rules of court for appeals

REVIEW

124.—(1) Upon an application by way of originating notice, the High Court may by order grant any relief in respect of matters arising under this Act that the applicant would be entitled to in proceedings by way of an application for an order in the nature of mandamus, prohibition or *certiorari*. Application for relief in nature of mandamus, prohibition, certiorari

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Sec. 124 (2)

Notice of
application

(2) Notice of an application under this section shall be served on,

- (a) the person whose act or omission gives rise to the application;
- (b) any person who is a party to a proceeding that gives rise to the application; and
- (c) the Attorney General.

Appeal

(3) An appeal lies to the Court of Appeal from an order made under this section. 1979, c. 4, s. 124.

Notice re
certiorari

125.—(1) A notice under section 124 in respect of an application for relief in the nature of *certiorari* shall be given at least seven days and not more than ten days before the date fixed for the hearing of the application and the notice shall be served within thirty days after the occurrence of the act sought to be quashed.

Filing
material

(2) Where a notice referred to in subsection (1) is served on the person making the decision, order or warrant or holding the proceeding giving rise to the application, such person shall forthwith file in the High Court for use on the application, all material concerning the subject-matter of the application.

Where
appeal
available

(3) No application shall be made to quash a conviction, order or ruling from which an appeal is provided by this Act, whether subject to leave or otherwise.

Substantial
wrong

(4) On an application for relief in the nature of *certiorari*, the High Court shall not grant relief unless the court finds that a substantial wrong or miscarriage of justice has occurred, and the court may amend or validate any decision already made, with effect from such time and on such terms as the court considers proper.

Order for
immunity
from civil
liability

(5) Where an application is made to quash a decision, order, warrant or proceeding made or held by a justice on the ground that he exceeded his jurisdiction, the High Court may, in quashing the decision, order, warrant or proceeding, order that no civil proceeding shall be taken against the justice or against any officer who acted under the decision, order or warrant or in the proceeding or under any warrant issued to enforce it. 1979, c. 4, s. 125.

Application
for *habeas*
corpus

126.—(1) Upon an application by way of originating notice, the High Court may by order grant any relief in

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respect of a matter arising under this Act that the applicant would be entitled to in proceedings by way of an application for an order in the nature of *habeas corpus*.

(2) Notice of an application under subsection (1) for relief in the nature of *habeas corpus* shall be served upon the person having custody of the person in respect of whom the application is made and upon the Attorney General and upon the hearing of the application the presence before the High Court of the person in respect of whom the application was made may be dispensed with by consent, in which event the High Court may proceed to dispose of the matter forthwith as the justice of the case requires.

Procedure on application for relief in nature of *habeas corpus*

(3) Subject to subsections (1) and (2), the *Habeas Corpus Act* applies to applications under this section, but an application for relief in the nature of *certiorari* may be brought in aid of an application under this section.

Application of R.S.O. 1980, c. 193

(4) The *Judicial Review Procedure Act* and sections 68 and 69 of the *Judicature Act* do not apply to matters in respect of which an application may be made under section 124.

R.S.O. 1980, cc. 224 and 223 do not apply

(5) A court to which an application or appeal is made under section 124 or this section may make any order with respect to costs that it considers just and reasonable. 1979, c. 4, s. 126.

Costs

PART VII

ARREST, BAIL AND SEARCH WARRANTS

Arrest

127. In this Part, “officer in charge” means the police officer who is in charge of the lock-up or other place to which a person is taken after his arrest. 1979, c. 4, s. 127.

Officer in charge

128.—(1) A warrant for the arrest of a person shall be executed by a police officer by arresting the person against whom the warrant is directed wherever he is found in Ontario.

Execution of warrant

(2) A police officer may arrest without warrant a person for whose arrest he has reasonable and probable grounds to believe that a warrant is in force in Ontario. 1979, c. 4, s. 128.

Idem

129. Any person may arrest without warrant a person who he has reasonable and probable grounds to believe has com-

Arrest without warrant

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mitted an offence and is escaping from and freshly pursued by a police officer who has lawful authority to arrest that person, and, where the person who makes the arrest is not a police officer, shall forthwith deliver the person arrested to a police officer. 1979, c. 4, s. 129.

Use of
force

130.—(1) Every police officer is, if he acts on reasonable and probable grounds, justified in using as much force as is necessary to do what he is required or authorized by law to do.

Use of force
by citizen

(2) Every person upon whom a police officer calls for assistance is justified in using as much force as he believes on reasonable and probable grounds is necessary to render such assistance. 1979, c. 4, s. 130.

Immunity
from civil
liability

131. Where a person is wrongfully arrested, whether with or without a warrant, no action for damages shall be brought,

- (a) against the police officer making the arrest if he believed in good faith and on reasonable and probable grounds that the person arrested was the person named in the warrant or was subject to arrest without warrant under the authority of an Act;
- (b) against any person called upon to assist the police officer if such person believed that the police officer had the right to effect the arrest; or
- (c) against any person required to detain the prisoner in custody if such person believes the arrest was lawfully made. 1979, c. 4, s. 131.

Production
of process

132.—(1) It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

Notice of
reason for
arrest

(2) It is the duty of every one who arrests a person, whether with or without warrant, to give notice to that person, where it is feasible to do so, of the reason for the arrest. 1979, c. 4, s. 132.

Bail

Release
after
arrest
by
officer

133.—(1) Where a police officer acting under a warrant or other power of arrest, arrests a person, the police officer shall, as soon as is practicable, release the person from custody after serving him with a summons or offence notice unless he has reasonable and probable grounds to believe that,

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- (a) it is necessary in the public interest for the person to be detained, having regard to all the circumstances including the need to,
 - (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence, or
 - (iii) prevent the continuation or repetition of the offence or the commission of another offence; or
 - (b) the person arrested is ordinarily resident outside Ontario and will not respond to a summons or offence notice.
- (2) Where a defendant is not released from custody under subsection (1), the police officer shall deliver him to the officer in charge who shall, where in his opinion the conditions set out in clauses (1) (a) and (b) do not or no longer exist, release the defendant, Release by officer in charge
- (a) upon serving him with a summons or offence notice;
 - (b) upon his entering into a recognizance in the prescribed form without sureties conditioned for his appearance in court.
- (3) Where the defendant is held for the reason only that he is not ordinarily resident in Ontario and it is believed that he will not respond to a summons or offence notice, the officer in charge may, in addition to anything required under subsection (2), require the defendant to deposit cash or other satisfactory negotiable security in an amount not to exceed, Cash bail by non-resident
- (a) where the proceeding is commenced by certificate under Part I or II, the amount of the set fine for the offence or, if none, \$300; or
 - (b) where the proceedings is commenced by information under Part III, \$500. 1979, c. 4, s. 133.
- 134.**—(1) Where a defendant is not released from custody under section 133, the officer in charge shall, as soon as is practicable but in any event within twenty-four hours, bring him before a justice and the justice shall, unless a plea of guilty is taken, order that the defendant be released upon giving his undertaking to appear unless the prosecutor having been given an opportunity to do so shows cause why the Person in custody to be brought before justice

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detention of the defendant is justified to ensure his appearance in court or why an order under subsection (2) is justified for the same purpose.

Order for
conditional
release

(2) Subject to subsection (1), the justice may order the release of the defendant,

- (a) upon his entering into a recognizance to appear with such conditions as are appropriate to ensure his appearance in court;
- (b) where the offence is one punishable by imprisonment for twelve months or more, conditional upon his entering into a recognizance before a justice with sureties in such amount and with such conditions, if any, as are appropriate to ensure his appearance in court or, with the consent of the prosecutor, upon his depositing with the justice such sum of money or other valuable security as the order directs in an amount not exceeding,
 - (i) where the proceeding is commenced by certificate under Part I or II, the amount of the set fine for the offence or, if none, \$300, or
 - (ii) where the proceeding is commenced by information under Part III, \$1,000; or
- (c) if the defendant is not ordinarily resident in Ontario, upon his entering into a recognizance before a justice, with or without sureties, in such amount and with such conditions, if any, as are appropriate to ensure his appearance in court, and depositing with the justice such sum of money or other valuable security as the order directs in an amount not exceeding,
 - (i) where the proceeding is commenced by certificate under Part I or II, the amount of the set fine for the offence or, if none, \$300, or
 - (ii) where the proceeding is commenced by information under Part III, \$1,000.

Idem

(3) The justice shall not make an order under clause (2) (b) or (c) unless the prosecutor shows cause why an order under the immediately preceding clause should not be made.

Order for
detention

(4) Where the prosecutor shows cause why the detention of the defendant in custody is justified to ensure his appearance

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in court, the justice shall order the defendant to be detained in custody until he is dealt with according to law.

(5) The justice shall include in the record a statement of his reasons for his decision under subsection (1), (2) or (4). Reasons

(6) In a proceeding under subsection (1), the justice may receive and base his decision upon information he considers credible or trustworthy in the circumstances of each case except that the defendant shall not be examined or cross-examined in respect of the offence with which he is charged. Evidence at hearing

(7) A proceeding under subsection (1) shall not be adjourned for more than three days without the consent of the defendant. 1979, c. 4, s. 134. Adjournments

135.—(1) Where a defendant is not released from custody under section 133 or 134, he shall be brought before the court forthwith and, in any event, within eight days. Expediting trial of person in custody

(2) The justice presiding upon any appearance of the defendant in court may, upon the application of the defendant or prosecutor, review any order made under section 134 and make such further or other order under section 134 as to him seems appropriate in the circumstances. 1979, c. 4, s. 135. Further orders

136. A defendant or the prosecutor may appeal from an order or refusal to make an order under section 134 or 135 and the appeal shall be to the county or district court of the county or district in which the adjudication was made and shall be conducted in accordance with the rules made under section 123. 1979, c. 4, s. 136. Appeal

137.—(1) A person who is released upon deposit under subsection 133 (3) or clause 134 (2) (c) may appoint the clerk of the court to act as his agent, in the event that he does not appear to answer to the charge, for the purpose of entering a plea of guilty on his behalf and authorizing the clerk to apply the amount so deposited toward payment of the fine and costs imposed by the court upon the conviction, and the clerk shall act as agent under this subsection without fee. Appointment of agent for appearance

(2) An officer in charge or justice who takes a recognizance, money or security under section 133 or 134 shall make a return thereof to the court where the defendant is required to appear. Returns to court

(3) The clerk of the court shall, upon the conclusion of proceedings, make a financial return to every person who depos- Returns to sureties

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ited money or security under a recognizance and return the surplus, if any. 1979, c. 4, s. 137.

Recognizance
binds for all
appearances

138.—(1) The recognizance of a person to appear in a proceeding binds the person and his sureties in respect of all appearances required in the proceeding at times and places to which the proceeding is adjourned.

Recognizance
binds
independ-
ently of
other charges

(2) A recognizance is binding in respect of appearances for the offence to which it relates and is not vacated upon the arrest, discharge or conviction of the defendant upon another charge.

Liability
of principal

(3) The principal to a recognizance is bound for the amount of the recognizance due upon forfeiture.

Liability
where
sureties

(4) The principal and each surety to a recognizance are bound, jointly and severally, for the amount of the recognizance due upon forfeiture for non-appearance. 1979, c. 4, s. 138.

Application
by surety
to be
relieved

139.—(1) A surety to a recognizance may, by application in writing to the court at which the defendant is required to appear, apply to be relieved of his obligation under the recognizance and the court shall thereupon issue a warrant for the arrest of the defendant.

Certificate
of arrest

(2) When a police officer arrests the defendant under a warrant issued under subsection (1), he shall bring the defendant before a justice under section 134 and certify the arrest by certificate in the prescribed form and deliver the certificate to the court.

Vacating of
recognizance

(3) The receipt of the certificate by the court under subsection (2) vacates the recognizance and discharges the sureties. 1979, c. 4, s. 139.

Delivery of
defendant
by surety

140. A surety to a recognizance may discharge his obligation under the recognizance by delivering the defendant into the custody of the court at which he is required to appear at any time while it is sitting at or before the trial of the defendant. 1979, c. 4, s. 140.

Certificate
of default

141.—(1) Where a person who is bound by recognizance does not comply with a condition of the recognizance, a justice having knowledge of the facts shall endorse on the recognizance a certificate in the prescribed form setting out,

(a) the nature of the default;

Sec. 141 (6)

PROVINCIAL OFFENCES

Chap. 400

- (b) the reason for the default, if it is known;
- (c) whether the ends of justice have been defeated or delayed by reason of the default; and
- (d) the names and addresses of the principal and sureties.

(2) A certificate that has been endorsed on a recognizance under subsection (1) is evidence of the default to which it relates.

Certificate
as evidence

(3) The clerk of the court shall transmit the endorsed recognizance to the clerk of the county or district court of the same county or district and, upon its receipt, the endorsed recognizance constitutes an application for the forfeiture of the recognizance.

Application
for
forfeiture

(4) A judge of the county or district court shall fix a time and place for the hearing of the application by the county or district court and the clerk of the county or district court shall not less than ten days before the time fixed for the hearing, deliver notice to the prosecutor and to each principal and, where the application is for forfeiture for non-appearance, each surety named in the recognizance, of the time and place fixed for the hearing and requiring each principal and surety to show cause why the recognizance should not be forfeited.

Notice of
hearing

(5) The county or district court may, after giving the parties an opportunity to be heard, in its discretion grant or refuse the application and make any order in respect of the forfeiture of the recognizance that the court considers proper.

Order as to
forfeiture

(6) Where an order for forfeiture is made under subsection (5),

Collection
on
forfeiture

- (a) any money or security forfeited shall be paid over by the person who has custody of it to the person who is entitled by law to receive it; and
- (b) the principal and surety become judgment debtors of the Crown jointly and severally in the amount forfeited under the recognizance and the amount may be collected in the same manner as money owing under a judgment of the county or district court. 1979, c. 4, s. 141.

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PROVINCIAL OFFENCES

Sec. 142 (1)

*Search Warrants*Search
warrant

142.—(1) Where a justice is satisfied by information upon oath that there is reasonable ground to believe that there is in any building, receptacle or place,

- (a) anything upon or in respect of which an offence has been or is suspected to have been committed; or
- (b) anything that there is reasonable ground to believe will afford evidence as to the commission of an offence,

he may at any time issue a warrant in the prescribed form under his hand authorizing a police officer or person named therein to search such building, receptacle or place for any such thing, and to seize and carry it before the justice issuing the warrant or another justice in the county or district in which the provincial offences court having jurisdiction in respect of the offence is situated to be dealt with by him according to law.

Expiration

(2) Every search warrant shall name a date upon which it expires, which date shall be not later than fifteen days after its issue.

When to be
executed

(3) Every search warrant shall be executed between 6 a.m. and 9 p.m. standard time, unless the justice by the warrant otherwise authorizes. 1979, c. 4, s. 142.

Detention
of things
seized

143.—(1) Where any thing is seized and brought before a justice, he shall by order,

- (a) detain it or direct it to be detained in the care of a person named in the order; or
- (b) direct it to be returned,

and the justice may in the order authorize the examination, testing, inspection or reproduction of the thing seized upon such conditions as are reasonably necessary and directed in the order, and may make any other provision as in the opinion of the justice is necessary for its preservation.

Time
limit for
detention

(2) Nothing shall be detained under an order made under subsection (1) for a period of more than three months after the time of seizure unless, before the expiration of that period,

Sec. 144 (2)

PROVINCIAL OFFENCES

Chap. 400

- (a) upon application, a justice is satisfied that having regard to the nature of the investigation, its further detention for a specified period is warranted and he so orders; or
- (b) proceedings are instituted in which the thing detained may be required.

(3) Upon the application of the defendant, prosecutor or person having an interest in a thing detained under subsection (1), a justice may make an order for the examination, testing, inspection or reproduction of any thing detained upon such conditions as are reasonably necessary and directed in the order.

Application
for
examination
and
copying

(4) Upon the application of a person having an interest in a thing detained under subsection (1), and upon notice to the defendant, the person from whom the thing was seized, the person to whom the search warrant was issued and any other person who has an apparent interest in the thing detained, a justice may make an order for the release of any thing detained to the person from whom the thing was seized where it appears that the thing detained is no longer necessary for the purpose of an investigation or proceeding.

Application
for release

(5) Where an order or refusal to make an order under subsection (3) or (4) is made by a justice of the peace, an appeal lies therefrom in the same manner as an appeal from a conviction in a proceeding commenced by means of a certificate. 1979, c. 4, s. 143.

Appeal
where
order by
justice of
the peace

144.—(1) Where under a search warrant a person is about to examine or seize a document that is in the possession of a lawyer and a solicitor-client privilege is claimed on behalf of a named client in respect of the document, the person shall, without examining or making copies of the document,

Examination
or seizure of
documents
where
privilege
claimed

- (a) seize the document and place it, together with any other document seized in respect of which the same claim is made on behalf of the same client, in a package and seal and identify the package; and
- (b) place the package in the custody of the clerk of the court in the jurisdiction of which the seizure was made or, with the consent of the person and the client, in the custody of another person.

(2) No person shall examine or seize a document that is in the possession of a lawyer without giving him a reasonable opportunity to claim the privilege under subsection (1).

Oportunity
to claim
privilege

Chap. 400

PROVINCIAL OFFENCES

Sec. 144 (3)

Examination
of documents
in custody

(3) A judge may, upon the *ex parte* application of the lawyer, by order authorize the lawyer to examine or make a copy of the document in the presence of its custodian or the judge, and the order shall contain such provisions as are necessary to ensure that the document is repackaged and resealed without alteration or damage.

Application
to determine
privilege

(4) Where a document has been seized and placed in custody under subsection (1), the client by or on whose behalf the claim of solicitor-client privilege is made may apply to a judge for an order sustaining the privilege and for the return of the document.

Limitation

(5) An application under subsection (4) shall be by notice of motion returnable not later than thirty days after the date on which the document was placed in custody.

Attorney
General
a party

(6) The person who seized the document and the Attorney General are parties to an application under subsection (4) and entitled to at least three days notice thereof.

Private
hearing and
scrutiny by
judge

(7) An application under subsection (4) shall be heard in private, and, for the purposes of the hearing, the judge may examine the document and, if he does so, shall cause it to be resealed.

Order

(8) The judge may, by order,

- (a) declare that the solicitor-client privilege exists or does not exist in respect of the document;
- (b) direct that the document be delivered up to the appropriate person.

Release of
document
where no
application
under
subs. (4)

(9) Where it appears to a judge upon the application of the Attorney General or person who seized the document that no application has been made under subsection (4) within the time limit prescribed by subsection (5), the judge shall order that the document be delivered to the applicant. 1979, c. 4, s. 144.

PART VIII

ORDERS ON APPLICATION UNDER STATUTES

Orders
under
statutes

145. Where, by any other Act, proceedings are authorized to be taken before a court or a justice for an order, including an order for the payment of money, this Act applies, with necessary modifications, to the proceeding in the same man-

Sec. 149

PROVINCIAL OFFENCES

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ner as to a proceeding commenced under Part III, and for the purpose,

- (a) in place of an information, the applicant shall complete a statement in the prescribed form under oath attesting, on reasonable and probable grounds, to the existence of facts that would justify the order sought; and
- (b) in place of a plea, the defendant shall be asked whether or not he wishes to dispute the making of the order. 1979, c. 4, s. 145.

PART IX

COMMENCEMENT AND TRANSITION

146.—(1) This Act, except Parts I and II, applies to offences in respect of which proceedings are commenced after the 31st day of March, 1980. Application

(2) Part I applies to offences occurring after the 31st day of March, 1980. Idem
Part I

(3) Part II applies to offences occurring after that Part comes into force. 1979, c. 4, s. 146, *revised*. Idem
Part II

147. Part II does not come into force until a day to be named by proclamation of the Lieutenant Governor. 1979, c. 4, s. 146, s. 149, *revised*. Proclamation
of Part II

148. *The Summary Convictions Act*, being chapter 450 of the Revised Statutes of Ontario, 1970, continues to apply in respect of offences to which this Act does not apply under section 146. 1979, c. 4, s. 147, *revised*. Application
of
R.S.O. 1970,
c. 450

149. *The Summary Convictions Act*, being chapter 450 of the Revised Statutes of Ontario, 1970, continues to apply in respect of parking infractions as defined in section 14 until Part II comes into force. 1983, c. 87, s. 1(1)

NOTE: 1983, c. 87, s. 1(2) provides as follows:

(2) Subsection (1) does not apply where an appeal is taken from a decision in respect of a parking infraction as defined in section 14 of the *Provincial Offences Act*,

- (a) if the appeal was filed before the 12th day of December, 1983 and the issue of the interpretation

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PROVINCIAL OFFENCES

Sec. 149

of section 148 of the *Provincial Offences Act* is a stated ground of the appeal; or

- (b) if the decision appealed from was made before the 12th day of December, 1983 and the issue of the interpretation of section 148 of the *Provincial Offences Act* was in issue before the court making the decision.

Reg. 815

PROVINCIAL OFFENCES

REGULATION 815

under the Provincial Offences Act

COSTS

1. Costs payable upon conviction are fixed as follows:

- | | |
|---|------|
| 1. For service of offence notice or summons | \$ 3 |
| 2. Upon conviction under section 9 of the Act | 2 |
| 3. Upon conviction <i>ex parte</i> | 3 |

R.R.O. 1980, Reg. 815, s. 1.

2.—(1) Costs may be awarded under subsection 61 (2) of the Act for the items and to a maximum of the amounts following:

- | | |
|---|------|
| 1. Fee for each witness for each day necessarily in attendance when trial scheduled | \$ 6 |
|---|------|

2. Travel expenses for each witness,

- | | |
|---|------|
| i. where witness resides in place where trial held | 2.50 |
| ii. where witness does not reside in place where trial held, a kilometre allowance as set out in Ontario Regulation 283/82 entitled "Kilometre Allowances". | |

R.R.O. 1980, Reg. 815, s. 2 (1); O. Reg. 285/82, s. 1 (1).

(2) REVOKED: O. Reg. 285/82, s. 1 (2).

Reg. 816

PROVINCIAL OFFENCES

REGULATION 816

under the Provincial Offences Act

EXTENSIONS OF PRESCRIBED TIMES

1. A provincial offences court, a provincial court (criminal division), a provincial court (family division), a county or district court or the Court of Appeal, when postal service within its territorial jurisdiction is disrupted or was disrupted so that notices or documents in fact are not being carried or were not carried through the mail, may extend any time prescribed by or under the Act or the rules governing procedures under the Act in order that parties to proceedings not be prejudiced by reason of the disruption. O. Reg. 203/80, s. 1.

Reg. 817

PROVINCIAL OFFENCES

Extracts from

REGULATION 817

under the Provincial Offences Act

PROCEEDINGS COMMENCED BY CERTIFICATE OF OFFENCE

1. A certificate of offence shall be in Form 101. R.R.O. 1980, Reg. 817, s. 1.
2. An offence notice shall be in Form 102. R.R.O. 1980, Reg. 817, s. 2.
3. A summons under Part 1 of the Act shall be in Form 103. R.R.O. 1980, Reg. 817, s. 3.
4. A notice of trial under Part 1 of the Act shall be in Form 104. R.R.O. 1980, Reg. 817, s. 4.
5. The words or expressions set out in Column 1 of a Schedule may be used in a certificate of offence, an offence notice or a summons to designate the offence under the provision set out opposite thereto in Column 2 of the Schedule under the Act, regulation or by-law set out in the heading to the Schedule. R.R.O. 1980, Reg. 817, s. 5.

PROVINCIAL OFFENCES

Reg. 817

Form 101
Provincial
Offences Act

Formule 101
Loi sur les
infractions provinciales.

PROVINCIAL
OFFENCES COURT
PROVINCE OF ONTARIO

COUR DES
INFRACTIONS
PROVINCIALES

CERTIFICATE OF OFFENCE/PROCÈS-VERBAL D'INFRACTION

On the _____ day of _____ 19 _____ Time _____
Le _____ à (heure)



NAME
NOM

ADDRESS
ADRESSE

DRIVER'S LICENSE NO. NUMÉRO DE PERMIS DE CONDUIRE				CVOR ICVU <input type="checkbox"/>	
SEX SEX	BIRTHDATE DATE DE NAISSANCE DAY MO YEAR JOUR MOIS ANNÉE	PLATE NO N° D'IMMATRICULATION	PROVINCE	MAKE MARQUE	

AT/A
(indiquez
l'endroit)

DID COMMIT THE OFFENCE OF
VOUS AVEZ COMMIS L'INFRACTION
SUIVANTE:

CONTRARY TO
EN CONTRAVENTION AVEC
LES DISPOSITIONS

SECTION
DE L'ARTICLE

I believe and certify the above offence has been committed and certify that I served an J'ai la conviction et j'atteste que l'infraction ci-dessus a été commise et je certifie que j'ai signifié un/une		
OFFENCE NOTICE / SUMMONS personally upon the person charged on the offence date AVIS D'INFRACTION / ASSIGNATION à personne à l'inculpe(e) le jour de l'infraction		
Signature of Issuing Provincial Offences Officer Signature de l'agent des infractions provinciales	Officer no. Agent de police n°	Unit Groupe

Summons issued for/Assignation délivrée pour

On the _____ day of _____ next at _____
Le _____ suivant à _____
AT Provincial Offences Court/Cour des infractions provinciales
A



SET FINE (including costs) \$ _____ ty compris les dépenses AMENDE DÉTERMINÉE	(Sec 346) Provincial Offences Act/ (Par 346) de la Loi sur les infractions provinciales)	Service Acknowledged Accusé de réception de la signification
SIGNATURE OF PERSON CHARGED/SIGNATURE DE L'INCULPÉ		
C.V.O.R. NUMBER (COMMERCIAL VEHICLES ONLY) NUMÉRO DE L'ICVU (VÉHICULES UTILITAIRES SEULEMENT)		

O. Reg. 460/86, s. 2, part.

Reg. 817

PROVINCIAL OFFENCES

Form 102
Provincial
Offences ActFormule 102
Loi sur les
infractions provinciales.OFFENCE NOTICE
AVIS D'INFRACTIONPROVINCIAL
OFFENCES COURT
PROVINCE OF ONTARIOCOUR DES
INFRACTIONS
PROVINCIALESYOU ARE CHARGED WITH THE FOLLOWING OFFENCE
VOUS ÊTES ACCUSÉ DE L'INFRACTION SUIVANTEOn the day of 19 Time
Le à (heure)

M

NAME
NOMADDRESS
ADRESSE

DRIVER'S LICENSE NO. NUMERO DE PERMIS DE CONDUIRE				CVOR ICVU	
				<input type="checkbox"/>	
SEX SEXE	BIRTHDATE DATE DE NAISSANCE DAY MO. YEAR JOUR MOIS ANNÉE	PLATE NO. N° D'IMMATRICULATION	PROVINCE	MAKE MARQUE	

AT/A
(Indiquez
l'endroit)DID COMMIT THE OFFENCE OF
VOUS AVEZ COMMIS L'INFRACTION
SUIVANTE:CONTRARY TO
EN CONTRAVENTION AVEC
LES DISPOSITIONSSECTION
DE L'ARTICLE

NOTICE
WITHIN 15 DAYS OF RECEIVING THIS OFFENCE NOTICE YOU
MAY CHOOSE ONE OF THE OPTIONS ON THE BACK OF THIS
FORM. IF YOU DO NOTHING, A CONVICTION WILL BE
ENTERED AGAINST YOU, AND FINE PAYMENT ENFORCEMENT
WILL FOLLOW.

AVIS
DANS LES QUINZE JOURS DE LA RECEPTION DU PRÉSENT
AVIS, VOUS POUVEZ EXERCER L'UN DES CHOIX QUI SONT
INDIQUÉS AU VERSO DE CETTE FORMULE. SI VOUS NE LE
FAITES PAS, VOUS SEREZ DÉCLARÉ COUPABLE ET LE
PAIEMENT DE L'AMENDE DEVIENT EXÉCUTOIRE.

Signature of Issuing Provincial Offences Officer Signature de l'agent des infractions provinciales	Officer no. Agent de police n°	Unit Groupe
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IF YOU PLEAD NOT GUILTY THE TRIAL SHALL BE HELD AT
SI VOUS PLAIDEZ NON COUPABLE, LE PROCÈS SE TIENDRA À
PROVINCIAL OFFENCES COURT/COUR DES INFRACTIONS PROVINCIALES

SET FINE (including costs) \$ (y compris les dépens) AMENDE DÉTERMINÉE:
--

IF YOU WISH TO PAY THE SET FINE
SHOWN, SIGN THE PLEA OF GUILTY
ON THE BACK AND FORWARD YOUR
PAYMENT AND THIS NOTICE TO THE
ADDRESS OF THE COURT SHOWN ON
THE BACK OF THIS NOTICESI VOUS DÉSIREZ ACOUITTER
L'AMENDE DÉTERMINÉE INDICUÉE
ICI, SIGNEZ LE PLAIDOYER DE
CULPABILITÉ AU VERSO ET FAITES
PARVENIR LE PAIEMENT DE
L'AMENDE ACCOMPAGNE DE CET
AVIS AU TRIBUNAL DONT L'ADRESSE
FIGURE AU VERSO.PROVINCIAL OFFENCES OFFICERS
ARE NOT ALLOWED TO ACCEPT
PAYMENT OR DOCUMENTS FOR
DELIVERY TO COURT
LES AGENTS DES INFRACTIONS
PROVINCIALES NE SONT PAS
AUTORISÉS À ACCEPTER LA
REMISE D'UN PAIEMENT OU DE
DOCUMENTS POUR LES REMETTRE
AU TRIBUNAL.

Date of service if other than offence date Date de la signification de l'avis si elle diffère de celle de l'infraction		
Day Jour	Month Mois	Year Année

PROVINCIAL OFFENCES

Reg. 817

IMPORTANT - PLEASE READ CAREFULLY

WITHIN 15 DAYS OF RECEIVING THIS OFFENCE NOTICE choose one of the following options. Complete the selected option (Sign where necessary), and deliver this Offence Notice (and payment where applicable) to the proper court office shown.

If you fail to exercise your choice within the 15 day period, you will be deemed not to wish to dispute the charge, and a Justice shall enter a conviction in your absence.

NOTEZ BIEN - VEUILLEZ LIRE ATTENTIVEMENT CE QUI SUIT

DANS LES QUINZE JOURS DE LA RÉCEPTION DU PRÉSENT AVIS D'INFRACTION, vous pouvez exercer l'un des choix suivants. Remplissez la partie de la formule qui correspond à votre choix (et signez lorsque cela est nécessaire) et remettez l'avis d'infraction (et votre paiement quand il y a lieu) au greffe du tribunal approprié qui y est indiqué.

Si vous n'exercez pas de choix dans les quinze jours de la réception du présent avis, vous serez réputé ne pas vouloir contester l'accusation et un juge vous déclarera coupable en votre absence.

DEFENDANT'S OPTIONS - ONE ONLY
CHOIX DU DÉFENDEUR - UN SEUL CHOIX EST PERMIS

1 Plea of guilty: payment out of court. I plead guilty and payment of the set fine is enclosed.
Plaidoyer de culpabilité: paiement à l'amiable. Je plaide coupable et joins à la présente le paiement de l'amende
 MAKE CHEQUE OR MONEY ORDER PAYABLE TO "PROVINCIAL COURT" AND WRITE THE OFFENCE NOTICE NUMBER ON THE CHEQUE.
FAIRE UN CHÈQUE OU MANDAT À L'ORDRE DE LA "COUR PROVINCIALE" ET ÉCRIRE LE NUMÉRO D'AVIS D'INFRACTION SUR LE CHÈQUE

 Signature/Signature du prévenu

OPTION 1 OR 3/CHOIX 1 OU 3
PROVINCIAL OFFENCES COURT/COUR DES INFRACTIONS PROVINCIALES

OPTION 2 ONLY/CHOIX 2 SEULEMENT
PROVINCIAL OFFENCES COURT/COUR DES INFRACTIONS PROVINCIALES

2 Plead guilty with an explanation: Within 15 days of receiving this notice, attend at the court office shown above within the times and days shown. You must bring this notice with you.
Plaidoyer de culpabilité accompagné d'une explication: Dans les quinze jours de la réception du présent avis, présentez-vous au greffe indiqué ci-dessus, à l'heure et au jour précisés. Veuillez apporter le présent avis avec vous.

3 Not guilty plea: I plead not guilty. I will appear at the time and date set for my trial. My mailing address is as shown on the front of this form, unless different information is noted below.
Plaidoyer de non-culpabilité: Je plaide non coupable. Je me présenterai à l'heure et à la date fixées pour mon procès. Mon adresse postale est celle indiquée au recto de la présente formule, sauf indication contraire ci-dessous.

DELIVER SIGNED FORM TO THE ADDRESS
 INDICATED BY THE ARROW
 REMETTRE LA FORMULE SIGNÉE À L'ADRESSE
 INDICUÉE PAR LA FLÈCHE

 Signature/Signature du prévenu

I, As a person who speaks the French language, I wish the trial to be held before a justice who speaks both English and French as provided by law.
Je parle français, et je désire que le procès ait lieu devant un juge qui parle anglais et français tel que la loi m'en donne le droit.



CHANGE OF NAME OR ADDRESS/CHANGEMENT DE NOM OU D'ADRESSE

NAME/NOM _____

ADDRESS/ADRESSE _____

O. Reg. 460/86, s. 2, part.

Reg. 817

PROVINCIAL OFFENCES

Form 103.
Provincial
Offences ActFormule 103
Loi sur les
infractions provinciales.

SUMMONS/ASSIGNATION

PROVINCIAL COURT COUR DES
OFFENCES COURT INFRACTIONS
PROVINCE OF ONTARIO PROVINCIALESYOU ARE CHARGED WITH THE FOLLOWING OFFENCE
VOUS ÊTES ACCUSÉ DE L'INFRACTION SUIVANTEOn the day of 19 Time
Le à (heure)

M

NAME
NOMADDRESS
ADRESSE

DRIVER'S LICENSE NO. NUMÉRO DE PERMIS DE CONDUIRE				CVOR ICVU <input type="checkbox"/>	
SEX SEXÉ	BIRTHDATE DATE DE NAISSANCE DAY MO YEAR JOUR MOIS ANNÉE	PLATE NO. N° D'IMMATRICULATION	PROVINCE	MAKE MARQUE	

AT/A
(indiquez
l'endroit)DID COMMIT THE OFFENCE OF
VOUS AVEZ COMMIS L'INFRACTION
SUIVANTE:CONTRARY TO
EN CONTRAVENTION AVEC
LES DISPOSITIONSSECTION
DE L'ARTICLETHIS IS THEREFORE TO COMMAND YOU IN HER
MAJESTY'S NAME TO APPEAR BEFORE THE
PROVINCIAL OFFENCES COURT.EN CONSÉQUENCE, CETTE ASSIGNATION VOUS
ORDONNE AU NOM DE SA MAJESTÉ DE
COMPARAÎTRE DEVANT LA COUR DES INFRACTIONS
PROVINCIALES.

Officer no Agent de police n°	Unit Groupe
----------------------------------	----------------

On the day of next at
Le Provincial Offences Court/Cour des infractions provinciales suivant à
AT
A

M

AND TO ATTEND THEREAFTER AS REQUIRED BY THE COURT IN ORDER TO BE DEALT WITH
ACCORDING TO LAW.ET D'Y ÊTRE PRÉSENT PAR LA SUITE LORSQUE LE TRIBUNAL L'EXIGERA, DE FAÇON À ÊTRE
TRAITE SELON LA LOI.THIS SUMMONS IS SERVED
UNDER PART I OF THE
PROVINCIAL OFFENCES
ACT.CETTE ASSIGNATION VOUS
EST SIGNIFIÉE AUX
TERMES DE LA PARTIE I DE
LA LOI SUR LES INFRACTIONS
PROVINCIALES.SIGNATURE OF PROVINCIAL OFFENCES OFFICER
SIGNATURE DE L'AGENT DES INFRACTIONS PROVINCIALES

O. Reg. 460/86, s. 2, part.

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Schedule 5

Highway Traffic Act

PART	ITEM	COLUMN 1	COLUMN 2
II			
Permits	1.	Drive motor vehicle, no permit	clause 7(1)(a)
	1a.	Drive motor vehicle, no currently validated permit	clause 7(1)(a)
	2.	Drive motor vehicle, no plates	clause 7(1)(b)
	2a.	Drive motor vehicle, fail to display two plates	clause 7(1)(b)
	2b.	Drive motor vehicle, plate improperly displayed	clause 7(1)(b)
	3.	Drive motor vehicle, no validation on plate	clause 7(1)(c)
	3a.	Drive motor vehicle, validation improperly affixed	clause 7(1)(c)
	4.	Draw trailer, no permit	clause 7(2b)(a)
	5.	Draw trailer, no plate	clause 7(2b)(b)
	5a.	Draw trailer, plate improperly displayed	clause 7(2b)(b)
	6.	Fail to surrender permit for motor vehicle	clause 7(2c)(a)
	6a.	Fail to surrender permit for trailer	clause 7(2c)(b)
	6b.	Have more than one permit	subsection 7(5a)
	7.	Drive motor vehicle, not in accordance with permit limitations	section 8
	7a.	Permit driving of motor vehicle, not in accordance with permit limitations	section 8
	8.	Make a false statement	subsection 9(1)
	9.	Fail to notify change of address	subsection 9(2)
	9a.	Fail to notify change of name	subsection 9(2)
	9b.	Fail to notify change of address-lessee	subsection 9(2a)
	9c.	Fail to notify change of name-lessee	subsection 9(2a)
	10.	Drive motor vehicle, no vehicle identification number	subsection 9a(1)
	10a.	Permit driving of motor vehicle, no vehicle identification number	subsection 9a(1)
	11.	Draw trailer, no identification number	clause 9a(2)(a)
	11a.	Permit drawing of trailer, no identification number	clause 9a(2)(a)
	12.	Draw conversion unit, no identification number	clause 9a(2)(b)
	12a.	Permit drawing of conversion unit, no identification number	clause 9a(2)(b)
	13.	Draw converter dolly, no identification number	clause 9a(2)(c)
	13a.	Permit drawing of converter dolly, no identification number	clause 9a(2)(c)
	14.	Fail to remove plates on ceasing to be owner	clause 10(1)(a)
	14a.	Fail to remove plates on ceasing to be lessee	clause 10(1)(a)
	15.	Fail to retain plate portion of permit	clause 10(1)(b)
	15a.	Fail to give vehicle portion of permit to new owner	subclause 10(1)(c)(i)
	16.	Fail to give vehicle portion of permit to lessor	subclause 10(1)(c)(ii)
	17.	Fail to apply for permit on becoming owner	subsection 10(2)
	18.	Deface plate	clause 12(1)(a)
	18a.	Deface validation	clause 12(1)(a)
	19.	Alter plate	clause 12(1)(a)
	19a.	Alter validation	clause 12(1)(a)
	19b.	Deface permit	clause 12(1)(a)
	19c.	Alter permit	clause 12(1)(a)
	20.	Use defaced plate	clause 12(1)(b)
	20a.	Use defaced validation	clause 12(1)(b)
	21.	Use altered plate	clause 12(1)(b)
	21a.	Use altered validation	clause 12(1)(b)
	22.	Permit use of defaced plate	clause 12(1)(b)
	22a.	Permit use of defaced validation	clause 12(1)(b)
	23.	Permit use of altered plate	clause 12(1)(b)
	23a.	Permit use of altered validation	clause 12(1)(b)
	23b.	Use defaced permit	clause 12(1)(b)
	23c.	Permit use of defaced permit	clause 12(1)(b)
	24.	Remove plate without authority	clause 12(1)(c)
	25.	Use plate not authorized for vehicle	clause 12(1)(d)
	25a.	Permit use of plate not authorized for vehicle	clause 12(1)(d)
	26.	Use validation not furnished by Ministry	clause 12(1)(e)

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II Permits cont'd.	26a.	Use validation not furnished for vehicle	clause 12(1)(e)
	27.	Permit use of validation not furnished by Ministry	clause 12(1)(e)
	27a.	Permit use of validation not furnished for vehicle	clause 12(1)(e)
	28.	Use plate not in accordance with Act	clause 12(1)(f)
	29.	Use plate not in accordance with regulations	clause 12(1)(f)
	30.	Use validation not in accordance with Act	clause 12(1)(f)
	31.	Use validation not in accordance with regulations	clause 12(1)(f)
	32.	Permit use of plate not in accordance with Act	clause 12(1)(f)
	33.	Permit use of plate not in accordance with regulations	clause 12(1)(f)
	34.	Permit use of validation not in accordance with Act	clause 12(1)(f)
	34a.	Permit use of validation not in accordance with regulations	clause 12(1)(f)
	35.	Confuse identity of plate	subsection 13(1)
	36.	Obstruct plate	subsection 13(2)
	37.	Dirty plate	subsection 13(2)
	37a.	Numbers on plate not plainly visible	subsection 13(2)
III Licences, Driver, Driving Instructor	38.	Drive motor vehicle—no licence	subsection 18(1)
	39.	Drive motor vehicle—improper licence	subsection 18(1)
	39a.	Drive streetcar—no licence	subsection 18(1a)
	39b.	Drive vehicle with air brakes—no endorsement	subsection 18(1b)
	40.	Drive motor vehicle in contravention of conditions	subsection 18(3)
	41.	Permit unlicensed person to drive motor vehicle	subsection 18(4)
	42.	Permit person with improper licence to drive motor vehicle	subsection 18(4)
	43.	Permit unlicensed person to drive	subsection 18(4)
	44.	Driver fail to surrender licence	subsection 19(1)
	45.	Driver fail to give identification	subsection 19(2)
	46.	Possess illegal licence	clause 21(a)
	47.	Lend driver's licence	clause 21(b)
	48.	Use other person's licence	clause 21(c)
	49.	Fail to surrender suspended licence to Ministry	clause 21(d)
	50.	Retain more than one licence	clause 21(e)
	51.	Driving under licence of other jurisdiction while suspended in Ontario	section 22
	52.	Employ person under 16 to drive	subsection 23(2)
	53.	Permit person under 16 to drive	subsection 23(2)
	54.	Let unlicensed driver hire vehicle	subsection 25(1)
	55.	Fail to produce licence when hiring vehicle	subsection 25(3)
	56.	Apply for permit while prohibited	subsection 30(2)
	57.	Procure permit while prohibited	subsection 30(2)
	58.	Possess permit while prohibited	subsection 30(2)
	59.	Apply for licence while prohibited	subsection 30(3)
	60.	Procure licence while prohibited	subsection 30(3)
	61.	Possess licence while prohibited	subsection 30(3)
	62.	Operate vehicle for which permit suspended	section 33
	63.	Operate vehicle for which permit cancelled	section 33
	64.	Driving while under suspension	section 35
IV Garage and Storage Licences	65.	No licence to operate vehicle business	subsection 41(3)
	66.	Interfere with officer inspecting vehicle business	subsection 41(5)
	67.	Fail to keep records	subsection 42(1)
	68.	Deal with vehicle with vehicle identification number altered	subsection 42(2)
	69.	Deface vehicle identification number	subsection 42(3)
	70.	Remove vehicle identification number	subsection 42(3)
	71.	Fail to notify re vehicle stored more than 2 weeks	subsection 42(4)
	72.	Fail to report damaged vehicle	subsection 42(5)
V Equipment	73.	Drive without proper headlights—motor vehicle	subsection 44(1)
	74.	Drive without proper rear light—motor vehicle	subsection 44(1)
	75.	Drive without proper headlight—motorcycle	subsection 44(2)
	76.	Drive without proper rear light—motorcycle	subsection 44(2)

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PART	ITEM	COLUMN 1	COLUMN 2
V	77.	Drive without proper headlights—motorcycle with sidecar	subsection 44(3)
Equipment cont'd.	78.	Drive without proper rear light—motorcycle with sidecar	subsection 44(3)
	79.	Drive with improper headlights	subsection 44(6)
	80.	Drive with headlamp coated	subsection 44(7)
	81.	Drive with headlamp covered	subsection 44(7)
	82.	Drive with headlamp modified	subsection 44(7)
	83.	More than 4 lighted headlights	subsection 44(9)
	84.	Improper clearance lights	subsection 44(10)
	85.	Fail to have proper identification lamps	subsection 44(11)
	86.	Fail to have proper side marker lamps	subsection 44(13)
	87.	Use lamp producing intermittent flashes of red light	subsection 44(14)
	88.	Red light at front	subsection 44(15)
	89.	Use V. F. F. lamp improperly	subsection 44(16)
	90.	Improper bicycle lighting	subsection 44(17)
	91.	Improper lighting on motor assisted bicycle	subsection 44(17)
	92.	Improper number plate light	subsection 44(19)
	93.	Use parking light while vehicle in motion	subsection 44(20)
	94.	Have more than one spotlight	subsection 44(22)
	95.	Improper use of spotlight	subsection 44(22)
	96.	Improper lights on traction engine	subsection 44(23)
	97.	No red light on rear of trailer	subsection 44(24)
	98.	No red light on rear of object	subsection 44(24)
	99.	No proper red lights—object over 2.6 m	subsection 44(25)
	100.	No lamp on left side	subsection 44(26)
	101.	Improper lights on farm vehicle	subsection 44(27)
	102.	No directional signals	subsection 44(29)
	103.	No brake lights	subsection 44(29)
	104.	No blue flashing light on snow removal vehicle	subsection 44(31)
	105.	Improper use of blue flashing light	subsection 44(32)
	106.	No sign—"right hand drive vehicle"	section 45
	107.	Improper braking system	subsection 46(1)
	108.	Improper brakes on motorcycle	subsection 46(2)
	109.	Improper brakes on motor assisted bicycle	subsection 46(2)
	110.	Improper brakes on trailer	subsection 46(3)
	111.	Defective brakes	subsection 46(5)
	112.	Defective braking system	subsection 46(5)
	113.	Sell improper brake fluid	clause 47(1)(a)
	113a.	Offer to sell improper brake fluid	clause 47(1)(a)
	113b.	Install improper brake fluid	clause 47(1)(a)
	114.	Sell improper hydraulic oil	clause 47(1)(b)
	114a.	Offer to sell improper hydraulic oil	clause 47(1)(b)
	114b.	Install improper hydraulic oil	clause 47(1)(b)
	115.	Improper windshield wiper	clause 48(1)(a)
	116.	No windshield wiper	clause 48(1)(a)
	117.	Improper mirror	clause 48(1)(b)
	118.	No mirror	clause 48(1)(b)
	119.	Improper mudguards	subsection 48(2)
	120.	No mudguards	subsection 48(2)
	121.	No odometer	subsection 48(4)
	122.	Defective odometer	subsection 48(4)
	123.	Operate motor vehicle—mirror more than 305 mm	section 49
	124.	No speedometer on bus	section 50
	125.	Defective speedometer on bus	section 50
	126.	Improper tire—damage to highway	subsection 51(1)
	127.	Device on wheels—injure highway	subsection 51(2)
	128.	No lock shoe—animal drawn vehicle	subsection 51(3)
	129.	Improper tires	clause 52(3)(a)
	130.	Improper tires—drawn vehicle	clause 52(3)(a)
	131.	Improperly installed tires	clause 52(3)(b)
	132.	Improperly installed tires—drawn vehicle	clause 52(3)(b)
	133.	Fail to mark rebuilt tire	subsection 53(2)

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PART	ITEM	COLUMN 1	COLUMN 2
V Equipment cont'd.	134.	Sell unmarked rebuilt tire	subsection 53(3)
	135.	Offer to sell unmarked rebuilt tire	subsection 53(3)
	136.	Sell new vehicle—no safety glass	subsection 54(2)
	137.	Register new vehicle—no safety glass	subsection 54(2)
	138.	Install non-safety glass	subsection 54(3)
	139.	Window obstructed	clause 55(1)(a)
	140.	Windshield obstructed	clause 55(1)(a)
	141.	Have object obstructing view	clause 55(1)(b)
	142.	Drive with window coated—view obstructed	subsection 55(2)
	143.	Drive with windshield coated—view obstructed	subsection 55(2)
	144.	Colour coating obscuring interior	subsection 55(3)
	145.	No clear view to front	clause 56(1)(a)
	146.	No clear view to sides	clause 56(1)(a)
	147.	No clear view to rear	clause 56(1)(b)
	148.	No muffler—motor vehicle	subsection 57(1)
	149.	No muffler—motor assisted bicycle	subsection 57(1)
	150.	Improper muffler—motor vehicle	subsection 57(1)
	151.	Improper muffler—motor assisted bicycle	subsection 57(1)
	152.	Excessive fumes	subsection 57(3)
	153.	Unreasonable noise—signalling device	subsection 57(4)
	154.	Unreasonable smoke	subsection 57(4)
	155.	Unnecessary noise	subsection 57(4)
	156.	No horn—motor vehicle	subsection 57(5)
	157.	No horn—motor assisted bicycle	subsection 57(5)
	158.	No horn—bicycle	subsection 57(5)
	159.	Defective horn—motor vehicle	subsection 57(5)
	160.	Defective horn—motor assisted bicycle	subsection 57(5)
	161.	Defective horn—bicycle	subsection 57(5)
	162.	Have a siren	subsection 57(6)
	163.	No slow moving vehicle sign	subsection 58(1)
	164.	No sleigh bells	subsection 59(1)
	165.	Television in front seat	clause 60(1)(a)
	166.	Television visible to driver	clause 60(1)(b)
	167.	Television operating in front seat	subsection 60(2)
	168.	Television operating—visible to driver	subsection 60(2)
	169.	Drive motor vehicle with radar warning device	section 61
	170.	Improper means of attachment	section 62
	171.	Improperly modified suspension system	section 63
	172.	Fail to submit vehicle for tests	subsection 65(3)
	173.	Operate unsafe vehicle	section 67
	173a.	Operate unsafe streetcar	section 67
	173b.	Operate unsafe combination of vehicles	section 67
	174.	Permit operation of unsafe vehicle	section 67
	174a.	Permit operation of unsafe streetcar	section 67
	174b.	Permit operation of unsafe combination of vehicles	section 67
	175.	Operate vehicle—fail to display device	subsection 68(1)
	176.	Permit operation of vehicle—fail to display device	subsection 68(1)
	177.	Issue SSC not provided by Ministry	section 69
	178.	Affix vehicle inspection sticker not provided by Ministry	section 69
	179.	REVOKED: O. Reg. 33/83, s. 1 (3), <i>part.</i>	
	180.	REVOKED: O. Reg. 33/83, s. 1 (3), <i>part.</i>	
	181.	REVOKED: O. Reg. 33/83, s. 1 (3), <i>part.</i>	
	182.	REVOKED: O. Reg. 33/83, s. 1 (3), <i>part.</i>	
	183.	Unauthorized person issue SSC	subsection 74(1)
	184.	Unauthorized person affix vehicle inspection sticker	subsection 74(2)
	185.	Issue SSC without proper inspection	clause 74(3)(a)
	186.	Affix vehicle inspection sticker without proper inspection	clause 74(3)(a)
	187.	Issue SSC—vehicle not complying	clause 74(3)(a)
	188.	Affix vehicle inspection sticker—vehicle not complying	clause 74(3)(a)
	189.	SSC not made by inspection mechanic	subclause 74(3)(b)(i)
	190.	Vehicle inspection record not made by inspection mechanic	subclause 74(3)(b)(i)

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V Equipment cont'd.	191.	SSC not countersigned	subclause 74(3)(b)(ii)
	192.	Unlicensed inspection station	subsection 75(1)
	193.	Corporation fail to notify change of officer or director	subsection 75(7)
	194.	Unregistered mechanic certify SSC	subsection 76(1)
	195.	Unregistered mechanic sign vehicle inspection record	subsection 76(1)
	196.	Obstruct inspector	subsection 82(6)
	197.	False statement in SSC	subsection 83(2)
	198.	Sell new vehicle not complying with standards	subsection 86(3)
	199.	Offer for sale new vehicle not complying with standards	subsection 86(3)
	200.	Expose for sale new vehicle not complying with standards	subsection 86(3)
	201.	Sell new vehicle not marked or identified	subsection 86(3)
	202.	Offer for sale new vehicle not marked or identified	subsection 86(3)
	203.	Expose for sale new vehicle not marked or identified	subsection 86(3)
	204.	No name on commercial vehicle	subsection 87(1)
	205.	Less than two reflectors—commercial vehicle	subsection 87(2)
	206.	Less than two reflectors—trailer	subsection 87(2)
	207.	Sell new commercial vehicle without two red rear lights	clause 87(3)(a)
	208.	Offer to sell new commercial vehicle without two rear red lights	clause 87(3)(a)
	209.	Sell trailer without two red rear lights	clause 87(3)(a)
	210.	Offer to sell trailer without two red rear lights	clause 87(3)(a)
	211.	Sell new commercial vehicle without two rear red reflectors	clause 87(3)(b)
	212.	Offer to sell new commercial vehicle without two rear red reflectors	clause 87(3)(b)
	213.	Sell trailer without two rear red reflectors	clause 87(3)(b)
	214.	Offer to sell trailer without two rear red reflectors	clause 87(3)(b)
	215.	No name and address on road-building machine	subsection 87(4)
	216.	Fail to wear proper helmet on motorcycle	subsection 88(1)
	217.	Fail to wear proper helmet on motor assisted bicycle	subsection 88(1)
	217a.	Carry passenger under 16 not wearing proper helmet	subsection 88(1a)
	218.	Dealing with vehicle not conforming to standard	subsection 89(1)
	219.	Dealing with motor assisted bicycle—no document of compliance	subsection 89(2)
	220.	Drive with seat belt assembly removed	subsection 90(2)
	221.	Drive with seat belt assembly inoperative	subsection 90(2)
	222.	Drive with seat belt assembly modified	subsection 90(2)
	223.	Driver—fail to wear complete seat belt assembly	subsection 90(3)
	224.	Driver—fail to properly adjust complete seat belt assembly	subsection 90(3)
	225.	Driver—fail to securely fasten complete seat belt assembly	subsection 90(3)
	226.	Passenger—fail to wear complete seat belt assembly	subsection 90(4)
	227.	Passenger—fail to properly adjust complete seat belt assembly	subsection 90(4)
	228.	Passenger—fail to securely fasten complete seat belt assembly	subsection 90(4)
	229.	Driver—fail to ensure passenger wears complete seat belt assembly	subsection 90(6)
	230.	Driver—fail to ensure passenger properly adjusts complete seat belt assembly	subsection 90(6)
	231.	Driver—fail to ensure passenger securely fastens complete seat belt assembly	subsection 90(6)
VI Load and Dimensions	232.	Overwidth vehicle	subsection 92(1)
	233.	Overwidth load	subsection 92(1)
	234.	Overlength vehicle	subsection 92(6)
	235.	Overlength combination of vehicles	subsection 92(6)
	236.	Overlength semi-trailer	subsection 92(7)
	237.	Overlength bus	subsection 92(8)
	238.	Overheight vehicle	subsection 92(10)

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PART	ITEM	COLUMN 1	COLUMN 2
VI Load and Dimensions	239.	Fail to carry permit in vehicle	subsection 93(6)
	240.	Fail to produce permit	subsection 93(6)
	241.	Oversize vehicle—violate permit	subsection 93(7)
	242.	Overweight vehicle—violate permit	subsection 93(7)
	243.	Fail to mark overhanging load	subsection 94(1)
	244.	Insecure load	subsection 94(2)
	245.	Overweight on tires ...kg.	clause 98(1)(a)
	246.	Overweight on tires ...kg.	clause 98(1)(b)
	247.	Overweight single axle (single tires) ...kg. Class A Highway	clause 99(1)(a)
	248.	Overweight single axle, (dual tires) ...kg. Class A Highway	clause 99(1)(b)
	249.	Overweight dual axle ...kg. Class A Highway	clause 99(1)(c)
	250.	Overweight triple axle ...kg. Class A Highway	clause 99(1)(d)
	251.	Overweight dual axle (single tires) ...kg. Class A Highway	subsection 99(2)
	252.	Overweight triple axle (single tires) ...kg. Class A Highway	subsection 99(3)
	253.	Overweight single front axle ...kg. No verification. Class A Highway	subsection 99(4)
	254.	Overweight single front axle ...kg. Exceed rating. Class A Highway	subsection 99(4)
	255.	Overweight two axle group ...kg. Class A Highway	clause 100(a)
	256.	Overweight three axle group ...kg. Class A Highway	clause 100(b)
	257.	Overweight four axle group ...kg. Class A Highway	clause 100(c)
	258.	Overweight vehicle ...kg. Class A Highway	subsection 101(1)
	259.	Fail to produce authority	subsection 101(2)
	260.	Overweight vehicle—violate authority	subsection 100(3)
	261.	Overweight during freeze-up ...kg.	subsection 102(3)
	262.	Overweight on axle ...kg. Class B Highway	section 103
	263.	Overweight vehicle—violate permit	subsection 104(1)
	264.	REVOKED: O. Reg. 33/83, s. 1 (3), <i>part</i> .	
	265.	REVOKED: O. Reg. 33/83, s. 1 (3), <i>part</i> .	
	266.	REVOKED: O. Reg. 33/83, s. 1 (3), <i>part</i> .	
	267.	Fail to have receipt in vehicle	subsection 104(5)
	268.	Fail to produce receipt	subsection 104(5)
	269.	Axle overloaded by ...kg. March and April	subsection 104(6)
	270.	Axle overloaded by ...kg. March and April	subsection 104(7)
	271.	Overweight on tires ...kg. March and April	subsection 104(8)
	272.	Fail to proceed to scale	subsection 105(6)
	273.	Fail to have load removed	clause 105(7)(a)
	274.	Obstruct weighing, measuring or examination	clause 105(7)(b)
	275.	Cause vehicle to be overloaded	section 107
VIII Rate of Speed	276.	Speeding	section 109
	277.	Careless driving	section 111
	278.	Unnecessary slow driving	section 113
IX Rules of the Road	279.	Disobey officer directing traffic	subsection 114(1)
	280.	Drive on closed highway	subsection 114(3)
	281.	Fail to yield—uncontrolled intersection	subsection 115(2)
	282.	Fail to yield to vehicle on right	subsection 115(3)
	283.	Disobey stop sign—stop wrong place	clause 116(1)(a)
	284.	Disobey stop sign—fail to stop	clause 116(1)(a)
	285.	Fail to yield to traffic on through highway	clause 116(1)(b)
	286.	Traffic on through highway—fail to yield	subsection 116(2)
	287.	Fail to yield—yield sign	subsection 118(1)
	288.	Fail to yield from private road	subsection 119(1)
	289.	Fail to yield from driveway	subsection 119(1)
	290.	Fail to yield to pedestrian	clause 120(1)(a)
	291.	Fail to yield to pedestrian approaching	clause 120(1)(b)
	292.	Fail to yield to person in wheelchair	clause 120(1)(a)
	293.	Fail to yield to person in wheelchair approaching	clause 120(1)(b)

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IX Rules of the Road cont'd.	294.	Pass stopped vehicle at crossover	subsection 120(2)
	295.	Pass stopped streetcar at crossover	subsection 120(2)
	296.	Stopped vehicle at crossover—fail to yield to pedestrian	clause 120(2)(a)
	297.	Stopped street car at crossover—fail to yield to pedestrian	clause 120(2)(a)
	298.	Stopped vehicle at crossover—fail to yield to person in wheelchair	clause 120(2)(a)
	299.	Stopped street car at crossover—fail to yield to person in wheelchair	clause 120(2)(a)
	300.	Stopped vehicle at crossover—fail to yield to pedestrian approaching	clause 120(2)(b)
	301.	Stopped street car at crossover—fail to yield to pedestrian approaching	clause 120(2)(b)
	302.	Stopped vehicle at crossover—fail to yield to person in wheelchair approaching	clause 120(2)(b)
	303.	Stopped street car at crossover—fail to yield to person in wheelchair approaching	clause 120(2)(b)
	304.	Pass front of vehicle within 30 m of crossover	subsection 120(3)
	305.	Pass front of street car within 30 m of crossover	subsection 120(3)
	306.	Pedestrian fail to yield at crossover	subsection 120(4)
	307.	Person in wheelchair—fail to yield at crossover	subsection 120(4)
	308.	Improper right turn	subsection 121(2)
	309.	Improper right turn—multi-lane highway	subsection 121(3)
	310.	Left turn—fail to afford reasonable opportunity to avoid collision	subsection 121(4)
	311.	Improper left turn	subsection 121(5)
	312.	Improper left turn—multi-lane highway	subsection 121(6)
	313.	Turn—not in safety	subsection 122(1)
	314.	Change lane—not in safety	subsection 122(1)
	315.	Fail to signal for turn	subsection 122(1)
	316.	Fail to signal—lane change	subsection 122(1)
	317.	Start from parked position—not in safety	subsection 122(2)
	318.	Start from stopped position—not in safety	subsection 122(2)
	319.	Start from parked position—fail to signal	subsection 122(2)
	320.	Start from stopped position—fail to signal	subsection 122(2)
	321.	Improper arm signal	subsection 122(4)
	322.	Improper signal device	subsection 122(5)
	323.	Use turn signals improperly	subsection 122(6)
	324.	Fail to signal stop	subsection 122(7)
	325.	Fail to signal decrease in speed	subsection 122(7)
	326.	Improper signal to stop	subsection 122(7)
	327.	Improper signal to decrease in speed	subsection 122(7)
	328.	Brake lights—improper colour	clause 122(7)(b)
	329.	U-turn on a curve—no clear view	clause 123(a)
	330.	U-turn—railway crossing	clause 123(b)
	331.	U-turn near crest or grade—no clear view	clause 123(c)
	332.	U-turn—bridge—no clear view	clause 123(d)
	333.	U-turn—viaduct—no clear view	clause 123(d)
	334.	U-turn—tunnel—no clear view	clause 123(d)
	335.	Improper stop—traffic signal at intersection	subsection 124(4)
	336.	Improper stop—traffic signal not at intersection	subsection 124(5)
	337.	Fail to yield to pedestrian	subsection 124(6)
	338.	Fail to yield to traffic	subsection 124(7)
	339.	Proceed contrary to sign at intersection	subsection 124(8)
	340.	Disobey lane light	subsection 124(9)
	341.	Green light—fail to proceed as directed	subsection 124(10)
	342.	Flashing green light—fail to proceed as directed	subsection 124(11)
	343.	Green arrow—fail to proceed as directed	subsection 124(12)
	344.	Amber light—fail to stop	subsection 124(13)
	345.	Amber arrow—fail to stop	subsection 124(14)
	346.	Amber arrow—fail to proceed as directed	subsection 124(14)
	347.	Flashing amber light—fail to proceed with caution	subsection 124(15)
	348.	Red light—fail to stop	subsection 124(16)

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PART	ITEM	COLUMN 1	COLUMN 2
IX Rules of the Road cont'd.	349.	Red light—proceed before green	subsection 124(16)
	350.	Turn on red light—fail to yield	subsection 124(17)
	351.	Emergency vehicle—proceed when unsafe	subsection 124(18)
	352.	Flashing red light—fail to stop	subsection 124(19)
	353.	Flashing red light—fail to yield	subsection 124(19)
	354.	Pedestrian fail to use crosswalk	subsection 124(20)
	355.	Pedestrian disobey flashing green light	subsection 124(22)
	356.	Pedestrian disobey red light	subsection 124(23)
	357.	Pedestrian disobey amber light	subsection 124(23)
	358.	Pedestrian disobey “don’t walk” signal	subsection 124(25)
	359.	Disobey portable amber light—fail to stop	subsection 125(3)
	360.	Disobey portable red light—fail to stop	subsection 125(4)
	361.	Disobey portable red light—proceed before green	subsection 125(4)
	362.	Disobey portable red light—stop wrong place	subsection 125(5)
	363.	Disobey portable amber light—stop wrong place	subsection 125(5)
	364.	Remove portable lane control signal system	subsection 125(6)
	365.	Deface portable lane control signal system	subsection 125(6)
	366.	Interfere with portable lane control signal system	subsection 125(6)
	367.	Revoked: O. Reg. 65/85, s. 1 (7), <i>part.</i>	
	368.	Revoked: O. Reg. 65/85, s. 1 (7), <i>part.</i>	
	369.	Revoked: O. Reg. 65/85, s. 1 (7), <i>part.</i>	
	370.	Revoked: O. Reg. 65/85, s. 1 (7), <i>part.</i>	
	371.	Revoked: O. Reg. 65/85, s. 1 (7), <i>part.</i>	
	372.	Fail to keep right—less than normal speed	section 126
	373.	Fail to share half roadway—meeting vehicle	subsection 127(1)
	374.	Fail to share roadway—meeting bicycle	subsection 127(2)
	375.	Fail to turn out to right when overtaken	subsection 127(3)
	376.	Fail to turn out to left to avoid collision	subsection 127(4)
	377.	Bicycle—fail to turn out to right when overtaken	subsection 127(5)
	378.	Fail to turn out to left to avoid collision with bicycle	subsection 127(5)
	379.	Motor assisted bicycle—fail to turn out to right when overtaken	subsection 127(5)
	380.	Fail to turn out to left to avoid collision with motor assisted bicycle	subsection 127(5)
	381.	Fail to stop to facilitate passing	subsection 127(6)
	382.	Fail to assist in passing	subsection 127(6)
	383.	Pass—roadway not clear—approaching traffic	clause 127(7)(a)
	384.	Attempt to pass—roadway not clear—approaching traffic	clause 127(7)(a)
	385.	Pass—roadway not clear—overtaking traffic	clause 127(7)(b)
	386.	Attempt to pass—roadway not clear—overtaking traffic	clause 127(7)(b)
	387.	Drive left of centre—no clear view	clause 128(a)
	388.	Drive left of centre—near crest of grade—no clear view	clause 128(a)
	389.	Drive left of centre—on a curve—no clear view	clause 128(a)
	390.	Drive left of centre—bridge—no clear view	clause 128(a)
	391.	Drive left of centre—viaduct—no clear view	clause 128(a)
	392.	Drive left of centre—tunnel—no clear view	clause 128(a)
	393.	Drive left of centre—railway crossing	clause 128(b)
	394.	Pass on right—not in safety	subsection 129(2)
	395.	Pass—off roadway	subsection 129(2)
	396.	Disobey official sign	subsection 130(1)
	397.	Drive wrong way—one way traffic	section 132
	398.	Fail to drive in marked lane	clause 133(a)
	399.	Unsafe lane change	clause 133(a)
	400.	Use centre lane improperly	clause 133(b)
	401.	Fail to obey lane sign	clause 133(c)
	402.	Drive wrong way—divided highway	clause 135(a)
	403.	Cross divided highway—no proper crossing provided	clause 135(b)
	404.	Follow too closely	subsection 136(1)
	405.	Commercial vehicle—follow too closely	subsection 136(2)
	406.	Fail to stop on right for emergency vehicle	clause 137(1)(a)
	407.	Fail to stop—nearest curb—for emergency vehicle	clause 137(1)(b)

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PART	ITEM	COLUMN 1	COLUMN 2
IX Rules of the Road cont'd.	408.	Fail to stop—nearest edge of roadway—for emergency vehicle	clause 137(1)(b)
	409.	Follow fire department vehicle too closely	subsection 137(2)
	410.	Permit attachment to vehicle	section 138
	411.	Permit attachment to streetcar	section 138
	412.	Draw more than one vehicle	section 139
	413.	Drive while crowded	section 140
	414.	Disobey railway crossing signal—stop wrong place	section 141
	415.	Disobey railway crossing signal—fail to stop	section 141
	416.	Disobey railway crossing signal—proceed unsafely	section 141
	417.	Disobey crossing gate	section 142
	418.	Open vehicle door improperly	clause 143(a)
	419.	Leave vehicle door open	clause 143(b)
	420.	Pass streetcar improperly	subsection 144(1)
	421.	Approach open streetcar door too closely	subsection 144(1)
	422.	Pass streetcar on the left side	subsection 144(2)
	423.	Frighten animal	section 145
	424.	Fail to ensure safety of person in charge of animal	section 145
	425.	Fail to use lower beam—oncoming	clause 146(a)
	426.	Fail to use lower beam—following	clause 146(b)
	427.	Fail to park—off roadway	clause 147(1)(a)
	428.	Fail to stop—off roadway	clause 147(1)(a)
	429.	Fail to stand—off roadway	clause 147(1)(a)
	430.	Park on roadway—no clear view	clause 147(1)(b)
	431.	Stop on roadway—no clear view	clause 147(1)(b)
	432.	Stand on roadway—no clear view	clause 147(1)(b)
	433.	Fail to take precaution against vehicle being set in motion	subsection 147(7)
	434.	Fail to have warning lights	clause 147(8)(a)
	435.	Fail to use warning lights	subsection 147(9)
	436.	Interfere with traffic	subsection 147(10)
	437.	Interfere with snow removal	subsection 147(10)
	438.	Race a motor vehicle	subsection 148(1)
	439.	Race an animal	section 149
	440.	Fail to stop at railway crossing	section 150
	441.	Stop wrong place at railway crossing	section 150
	442.	Fail to look both ways at railway crossing	section 150
	443.	Fail to open door at railway crossing	section 150
	444.	Change gears while crossing track	section 150
	445.	Bus other than school bus painted chrome yellow	subsection 151(3)
	446.	Prohibited markings	subsection 151(4)
	447.	Fail to stop for school bus—meeting	subsection 151(5)
	448.	Fail to stop for school bus—overtaking	subsection 151(6)
	448a.	Stop within 20 metres of school bus	subsection 151(6)
	449.	Fail to actuate school bus signals	subsection 151(7)
	450.	Discontinue school bus signals	subsection 151(8)
	451.	Improperly actuate school bus signals	subsection 151(12)
	452.	Stop school bus opposite loading zone	clause 151(13)(a)
	453.	Stop school bus improperly at loading zone	clause 151(13)(b)
	454.	School bus markings not covered	subsection 151(14)
	455.	School bus markings not covered	subsection 151(15)
	456.	Guard fail to properly display school crossing stop sign	subsection 152(2)
	456a.	Deposit snow or ice on roadway	section 157
	457.	Fail to obey school crossing stop sign	subsection 152(3)
	458.	Improper use of school crossing stop sign	subsection 152(4)
	459.	Unauthorized person display school crossing stop sign	subsection 152(5)
	460.	Solicit a ride	clause 153(a)
	461.	Solicit business	clause 153(b)
	462.	Attach to vehicle	subsection 154(1)
	463.	Attach to streetcar	subsection 154(1)
	464.	Ride 2 on a bicycle	subsection 154(2)
	465.	Ride another person on a motor assisted bicycle	subsection 154(3)
	466.	Person—attach to vehicle	subsection 154(4)

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PART	ITEM	COLUMN 1	COLUMN 2
IX Rules of the Road cont'd.	467.	Person—attach to streetcar	subsection 154(4)
	468.	Pedestrian fail to walk on left side of highway	section 155
	469.	Pedestrian on roadway fail to keep to left edge	section 155
	470.	Litter highway	section 156
	471.	Disobey sign	subsection 158(2)
	472.	Disobey sign at tunnel	subsection 159(2)
	473.	Deface notice	section 160
	474.	Remove notice	section 160
	475.	Interfere with notice	section 160
	476.	Deface obstruction	section 160
	477.	Remove obstruction	section 160
	478.	Interfere with obstruction	section 160
	479.	Fail to remove aircraft	subsection 163(1)
	480.	Move aircraft improperly	subsection 163(2)
	481.	Aircraft unlawfully take off	subsection 163(3)
	482.	Draw occupied trailer	section 164
	483.	Operate air cushioned vehicle	section 165
XIII Records and Reporting of Accidents and Convictions	484.	Fail to report accident	subsection 173(1)
	485.	Fail to furnish required information	subsection 173(1)
	486.	Occupant fail to report accident	subsection 173(2)
	487.	Police officer fail to report accident	subsection 173(3)
	488.	Fail to remain	clause 174(1)(a)
	489.	Fail to render assistance	clause 174(1)(b)
	490.	Fail to give required information	clause 174(1)(c)
	491.	Fail to report damage to property on highway	section 175
	492.	Fail to report damage to fence bordering highway	section 175
	493.	Medical practitioner—fail to report	subsection 177(1)
	494.	Optometrist—fail to report	subsection 178(1)
	495.	Failing to forward suspended licence to Registrar	subsection 185(2)
	496.	Fail to surrender suspended driver's licence	subsection 185(2)
	497.	Refuse to surrender suspended driver's licence	subsection 185(2)

O. Reg. 517/81, s. 1, *part*; O. Reg. 33/83, s. 1; O. Reg. 65/85, s. 1.

Schedule 6

Regulation 492 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Stopping—Schedule—Highway	section 1

R.R.O. 1980, Reg. 817, Sched. 6.

Schedule 7

Regulation 480 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Prohibited use of left lane on King's Highway	subsection 1(1)

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R.R.O. 1980, Reg. 817, Sched. 7.

Schedule 8

Regulation 456 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	No sign on dangerous load	section 1
2.	No sign on tanker	section 2
3.	No sign—radio active material	section 3
4.	Illegible load sign	section 4
5.	Inconspicuous load sign	section 4
6.	Improper use of sign	section 5

R.R.O. 1980, Reg. 817, Sched. 8.

Schedule 9

Regulation 464 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Instruct without licence	section 2
2.	Fail to display licence	section 10

R.R.O. 1980, Reg. 817, Sched. 9.

Schedule 10

Regulation 465 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Improper brakes on mobile home	section 4
2.	Unequal braking power	section 5

R.R.O. 1980, Reg. 817, Sched. 10.

Schedule 11

Regulation 468 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Vendor fail to return licence to Ministry	subsection 1(4)
2.	Purchaser fail to apply for new licence	subsection 1(4)
3.	Fail to keep record book	section 2
4.	Failure to return permit and number plates	clause 3(d)
5.	Fail to record exchange of engine	section 4

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ITEM	COLUMN 1	COLUMN 2
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R.R.O. 1980, Reg. 817, Sched. 11.

Schedule 12

Regulation 474 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Fail to report termination of mechanic	section 9
2.	Insufficient inspection area	clause 10(1)(a)
3.	Inadequate maintenance tools	clause 10(1)(b)
4.	Unclean conditions	clause 10(1)(c)
5.	Unsafe conditions	clause 10(1)(c)
6.	Poor condition of equipment	subsection 10(2)
7.	Fail to keep copy of SSC on premises	clause 11(a)
8.	Fail to keep record of vehicles inspected	clause 11(b)
9.	Fail to keep record of defects and recommended repairs	clause 11(b)
10.	Fail to keep record of agents	clause 11(c)
11.	Fail to keep signed inspection record	clause 11(d)
12.	Improper vehicle inspection record	clause 11(d)
13.	Fail to display identifying sign	subsection 12(1)
14.	Fail to return identifying sign	subsection 12(2)
15.	Unauthorized display of sign	subsection 12(3)
16.	Fail to return unused SSC's	clause 13(2)(a)
17.	Fail to return vehicle inspection records	clause 13(2)(b)
18.	Fail to return unused stickers	subsection 13(3)
19.	Fail to report missing SSC's	subsection 14(1)
20.	Incomplete information in report of missing SSC's	subsection 14(1)
21.	Fail to return recovered SSC's	subsection 14(2)

R.R.O. 1980, Reg. 817, Sched. 12.

Schedule 13

Regulation 496 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Bicycle on controlled-access highway	clause 1(a)
2.	Motorcycle 50 cc or less on controlled-access highway	clause 1(b)
3.	Motorcycle driven by electricity on controlled-access highway	clause 1(c)
4.	Motor assisted bicycle on controlled-access highway	clause 1(d)

R.R.O. 1980, Reg. 817, Sched. 13.

Schedule 14

Regulation 469 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

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ITEM	COLUMN 1	COLUMN 2
23.	Improper lights	subsection 20(1)
24.	Manufacturer sell substandard seat belt	subsection 26(2)
25.	Manufacturer sell unmarked seat belt	subsection 26(2)
26.	Manufacturer mark substandard seat belt	subsection 26(3)
27.	Sell unmarked seat belt	subsection 26(4)
28.	Improperly mark seat belt	subsection 26(6)
29.	Motorcycle handlebars more than 380 mm high	subsection 27(1)
30.	Motor assisted bicycle handlebars more than 380 mm high	subsection 27(1)
31.	Carry passenger improperly on motorcycle	subsection 27(2)
32.	No footrests for passenger on motorcycle	subsection 27(2)
33.	Passenger improperly seated on motorcycle	subsection 27(3)

R.R.O. 1980, Reg. 817, Sched. 14; O. Reg. 33/83, s. 3.

Schedule 15

Regulation 477 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Parking—improper parallel	section 2
2.	Parking—improper angle	subsection 3(1)
3.	Parking—obstruct sidewalk	subclause 4(1)(a)(i)
4.	Parking—obstruct crosswalk	subclause 4(1)(a)(ii)
5.	Parking—obstruct private entrance	subclause 4(1)(a)(iii)
6.	Parking—obstruct entrance-way	subclause 4(1)(a)(iv)
7.	Parking—obstruct fire hydrant	clause 4(1)(b)
8.	Parking—bridge	clause 4(1)(c)
9.	Parking—hotel entrance	subclause 4(1)(d)(i)
10.	Parking—theatre entrance	subclause 4(1)(d)(ii)
11.	Parking—public hall	subclause 4(1)(d)(iii)
12.	Parking—intersection	clause 4(1)(e)
13.	Parking—signal light	clause 4(1)(f)
14.	Parking—railway crossing	clause 4(1)(g)
15.	Parking—obstruct other vehicle	clause 4(1)(h)
16.	Parking—over time limit	clause 4(1)(i)
17.	Parking—disobey “no parking here to corner” sign	clause 4(2)(a)
18.	Parking—disobey sign at fire hall	clause 4(2)(b)
19.	Parking—disobey sign at school	clause 4(2)(c)
20.	Parking—Schedule highway	subsection 5(1)
21.	Parking—exceed time limit	subsection 5(2)

R.R.O. 1980, Reg. 817, Sched. 15.

Schedule 16

Regulation 484 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

Reg. 817

PROVINCIAL OFFENCES

ITEM	COLUMN 1	COLUMN 2
ITEM	COLUMN 1	COLUMN 2
1.	Fail to display "school bus" sign	clause 1(1)(a)
2.	Improper "school bus" sign	clause 1(1)(a)
3.	Fail to display "do not pass when signals flashing" sign	clause 1(1)(b)
4.	Improper "do not pass when signals flashing" sign	clause 1(1)(b)
5.	Fail to have signal lights	clause 1(1)(c)
6.	Improper signal lights	clause 1(1)(c)
7.	Control device not accessible to driver	paragraph 3 of clause 1(1)(c)
8.	Control device not equipped to signal driver	paragraph 3 of clause 1(1)(c)
9.	No first aid kit	clause 1(1)(d)
10.	Improper first aid kit	subclause 1(1)(d)(i)
11.	Improper first aid kit	subclause 1(1)(d)(ii)
12.	Fail to conceal "school bus" sign	subsection 1(2)
13.	Sell new school bus not conforming to CSA standards	section 2
14.	Offer to sell new school bus not conforming to CSA standards	section 2
15.	Improper mirror	clause 3(1)(a)
16.	No tire chains or snow tires	clause 3(1)(b)
17.	Improper speedometer	clause 3(1)(c)
18.	Inadequate body floor	clause 3(1)(d)
19.	Fail to have two constant-speed windshield wipers	clause 3(1)(e)
20.	Fail to have effective defrosting device	clause 3(1)(e)
21.	Fail to have adequate interior lighting	clause 3(1)(f)
22.	Fail to have interior lighted	clause 3(1)(f)
23.	Fail to have axe or clawbar	clause 3(1)(g)
24.	Axe or clawbar not securely mounted and accessible	clause 3(1)(g)
25.	Fail to have adequate fire extinguisher	clause 3(1)(g)
26.	Fire extinguisher not securely mounted and accessible	clause 3(1)(g)
27.	Fail to have dependable tires	clause 3(1)(h)
28.	Front tires rebuilt	clause 3(1)(h)
29.	Fail to have emergency door or exit	subclause 3(1)(i)(i)
30.	Improper emergency door	subclause 3(1)(i)(i)
31.	Fail to have required pushout windows	subclause 3(1)(i)(ii)
32.	Fail to have pushout window in rear	subsection 3(2)

R.R.O. 1980, Reg. 817, Sched. 16.

Schedule 17

Regulation 491 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Speeding—provincial park—more than 70 km-h on highway set out in Schedule	clause 1(a)
2.	Speeding—provincial park—more than 40 km-h	clause 1(b)

R.R.O. 1980, Reg. 817, Sched. 17.

PROVINCIAL OFFENCES

Reg. 817

Schedule 18

Regulation 494 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Drive with studded tire	subsection 2(2)
2.	Sale of tire—devices in tread	section 3

R.R.O. 1980, Reg. 817, Sched. 18.

Schedule 19

Regulation 495 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Pedestrian using controlled-access highway	subsection 1(1)

R.R.O. 1980, Reg. 817, Sched. 19.

Schedule 19a

Ontario Regulation 744/82 under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Vehicle modified—fail to apply for new permit	section 3

O. Reg. 33/83, s. 3.

Schedule 23

Compulsory Automobile Insurance Act

ITEM	COLUMN 1	COLUMN 2
1.	Fail to surrender suspended driver's licence	subsection 2(6)
2.	Refuse to surrender suspended driver's licence	subsection 2(6)
3.	Fail to have insurance card	subsection 3(1)
4.	Fail to surrender insurance card	subsection 3(1)
5.	Fail to disclose particulars of insurance	subsection 4(1)

O. Reg. 517/81, s. 1, *part.*

Schedule 24

Motorized Snow Vehicles Act

ITEM	COLUMN 1	COLUMN 2
1.	Owner—drive motorized snow vehicle, permit not issued	clause 2(1)(a)
2.	Owner—permit operation of motorized snow vehicle, permit not issued	clause 2(1)(b)
3.	Dealer—fail to register motorized snow vehicle	subsection 2(2)

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ITEM	COLUMN 1	COLUMN 2
4.	Fail to display registration number	subsection 2(7)
5.	Fail to display evidence of permit	subsection 2(8)
6.	Make false statement	subsection 3(1)
7.	Fail to notify change of address—permit	subsection 3(2)
8.	Fail to notify change of ownership	subsection 3(3)
9.	Dirty registration number	section 4
10.	Obstructed registration number	section 4
11.	Drive on prohibited serviced roadway	subsection 5(1)
12.	Drive across prohibited serviced roadway	clause 5(2)(a)
13.	Drive on prohibited highway	clause 5(2)(c)
14.	Cross highway improperly	section 7
15.	No licence—drive along highway	subsection 8(1)
16.	No licence—drive across highway	clause 8(2)(b)
17.	No licence—drive upon public trail	clause 8(3)(b)
18.	Drive—no insurance	subsection 11(1)
19.	Owner—permit uninsured person to drive	subsection 11(1)
20.	Fail to produce evidence of insurance	subsection 11(3)
21.	Produce false evidence of insurance	subsection 11(4)
22.	Fail to report—name(s) and address(es) of persons involved	clause 12(1)(a)
23.	Fail to report—date and location of occurrence	clause 12(1)(b)
24.	Fail to report—circumstances of collision	clause 12(1)(c)
25.	Police officer fail to forward report of collision	subsection 12(2)
26.	Speeding—in excess of 20 km-h, on highway where the limit is 50 km-h or less	subclause 13(1)(a)(i)
27.	Speeding—in excess of 20 km-h, in public park	subclause 13(1)(a)(ii)
28.	Speeding—in excess of 20 km-h, in exhibition grounds	subclause 13(1)(a)(ii)
29.	Speeding—in excess of 50 km-h, on highway where the limit is greater than 50 km-h	subclause 13(1)(b)(i)
30.	Speeding—in excess of 50 km-h, on public trail	subclause 13(1)(b)(ii)
31.	Carless driving	section 14
32.	Fail to produce licence	subsection 15(1)
33.	Driver—fail to identify self upon request of police office	subsection 15(3)
34.	Driver—fail to stop and identify self upon request of owner of land	subsection 15(4)
35.	No muffler	subsection 16(1)
36.	Improper muffler	subsection 16(2)
37.	Drive while having component or device removed or modified	subsection 16(2)
38.	Permit vehicle to be driven having component or device removed or modified	subsection 16(2)
39.	Improper tow bar attachment	subsection 17(1)
40.	Towing on serviced roadway	subsection 17(2)
41.	Fail to wear proper helmet	section 18
42.	Sell motorized snow vehicle not conforming to standards	subsection 19(1)
43.	Offer to sell motorized snow vehicle not conforming to standards	subsection 19(1)
44.	Trespass while operating motorized snow vehicle	subsection 23(1)
45.	Disobey sign	subsection 25(3)

O. Reg. 517/81, s. 1, *part.*

Schedule 25

*Regulation 669 of Revised Regulations of Ontario, 1980
under the Motorized Snow Vehicles Act*

PROVINCIAL OFFENCES

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ITEM	COLUMN 1	COLUMN 2
1.	Disobey police officer	section 2
2.	Fail to yield—uncontrolled intersection	section 3
3.	Fail to yield to vehicle on right	section 3
4.	Disobey sign	section 4
5.	Fail to stop—from adjoining property	clause 5(1)(a)
6.	Fail to yield—from adjoining property	clause 5(1)(b)
7.	Enter roadway improperly	subsection 5(2)
8.	Cross roadway improperly	subsection 5(2)
9.	Improper right turn	subsection 6(1)
10.	Left turn—fail to avoid reasonable opportunity to avoid collision	subsection 6(2)
11.	Improper left turn—2 way to 2 way	subsection 6(3)
12.	Improper left turn—1 way to 2 way	subsection 6(4)
13.	Improper left turn—2 way to 1 way	subsection 6(5)
14.	Improper left turn—1 way to 1 way	subsection 6(6)
15.	Turn—not in safety	subsection 7(1)
16.	Fail to signal for turn	subsection 7(1)
17.	Start from parked position—not in safety	subsection 7(2)
18.	Start from stopped position—not in safety	subsection 7(2)
19.	Start from parked position—fail to signal	subsection 7(2)
20.	Start from stopped position—fail to signal	subsection 7(2)
21.	Improper signal	subsection 7(3)
22.	Fail to signal stop	clause 7(4)(a)
23.	Fail to signal decrease in speed	clause 7(4)(a)
24.	Improper signal to stop	clause 7(4)(b)
25.	Improper signal to decrease speed	clause 7(4)(b)
26.	U-turn on curve—no clear view	clause 8(a)
27.	U-turn—railway crossing	clause 8(b)
28.	U-turn near crest of grade—no clear view	clause 8(c)
29.	U-turn—bridge—no clear view	clause (8)(d)
30.	U-turn—viaduct—no clear view	clause 8(d)
31.	U-turn—tunnel—no clear view	clause 8(d)
32.	Disobey traffic signal light	section 9
33.	Fail to share half roadway—meeting vehicle	subsection 10(1)
34.	Fail to pass oncoming vehicle on the right	subsection 10(1)
35.	Pass when roadway not clear—approaching traffic	clause 10(2)(a)
36.	Pass when roadway not clear—overtaking traffic	clause 10(2)(b)
37.	Drive left of centre—crest of grade—no clear view	section 11
38.	Drive left of centre—curve—no clear view	section 11
39.	Drive left of centre—bridge—no clear view	section 11
40.	Drive left of centre—viaduct—no clear view	section 11
41.	Drive left of centre—tunnel—no clear view	section 11
42.	Pass on right—not in safety	subsection 12(2)
43.	Follow too closely	section 13
44.	Fail to stop at railway	subsection 14(1)
45.	Cross railway when unsafe	subsection 14(1)
46.	Enter railway improperly	subsection 14(2)
47.	Cross railway improperly	subsection 14(2)
48.	Fail to park off roadway	clause 15(1)(a)
49.	Fail to stop off roadway	clause 15(1)(a)
50.	Fail to stand off roadway	clause 15(1)(a)
51.	Park on roadway—no clear view	clause 15(1)(b)
52.	Stop on roadway—no clear view	clause 15(1)(b)
53.	Stand on roadway—no clear view	clause 15(1)(b)
54.	Interfere with traffic	subsection 15(4)
55.	Interfere with snow removal	subsection 15(4)
56.	Speeding	section 16
57.	Fail to have proper headlight	section 17
58.	Fail to have proper rear light	section 17

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PROVINCIAL OFFENCES

ITEM	COLUMN 1	COLUMN 2
R.R.O. 1980, Reg. 817, Sched. 25.		

Schedule 26

Regulation 670 of Revised Regulations of Ontario, 1980
under the *Motorized Snow Vehicles Act*

ITEM	COLUMN 1	COLUMN 2
1.	Secure motorized snow vehicle operator's licence while having driver's licence	section 3
2.	Possess motorized snow vehicle operator's licence while having driver's licence	section 3

R.R.O. 1980, Reg. 817, Sched. 26.

Schedule 30

Public Commercial Vehicles Act

ITEM	COLUMN 1	COLUMN 2
1.	No operating licence	clause 2(1)(a)
2.	No licence plate on commercial vehicle	clause 2(1)(b)
3.	Contravene operating licence	clause 2(1)(c)
4.	Contravene vehicle licence	clause 2(1)(c)
5.	Soliciting	subsection 2(5)
6.	Hire unlicensed person	section 3
7.	Fail to carry copy of lease	subsection 4(4)
8.	Fail to produce copy of lease	subsection 4(4)
9.	Unauthorized agent	subsection 5(1)
10.	Discontinue service without notice	subsection 6(3)
11.	Overweight	subsection 16(1)
12.	No licence plate	subsection 16(2)
13.	Licence plate not plainly exposed	subsection 16(2)
14.	Licence holder—unlawfully operate vehicle	subsection 16(4)
15.	No freight forwarder's licence	subsection 18(1)
16.	Transport goods—improper operator	subsection 18(2)
17.	Fail to file toll tariff	subsection 24(1)
18.	Charge toll outside tariff	subsection 24(2)
19.	Fail to issue bill of lading	subsection 27(1)
20.	Improper bill of lading	subsection 27(2)
21.	Fail to carry copy of bill of lading	subsection 27(4)
22.	Fail to produce copy of bill of lading	subsection 27(4)
23.	Freight forwarder's goods—fail to carry copy of bill of lading	subsection 27(5)
24.	Freight forwarder's goods—fail to produce copy of bill of lading	subsection 27(5)
25.	No insurance	section 28
26.	Fail to issue certificate of insurance	subsection 29(1)
27.	Fail to notify of cancellation of insurance	subsection 29(3)
28.	Fail to carry vehicle licence	section 31
29.	Fail to produce vehicle licence	section 31
30.	Fail to carry copy of operating licence conditions	section 31
31.	Fail to produce copy of operating licence conditions	section 31

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ITEM	COLUMN 1	COLUMN 2
32.	Fail to stop vehicle upon direction	subsection 32(1)
33.	Fail to assist in examination	subsection 32(2)
34.	Fail to produce documents on examination	subsection 33(3)
35.	Obstruct investigation	subsection 33(4)
36.	Withhold relevant material	subsection 33(4)
37.	Conceal relevant material	subsection 33(4)
38.	Destroy relevant material	subsection 33(4)

O. Reg. 517/81, s. 1, *part.*

Schedule 31

Regulation 832 of Revised Regulations of Ontario, 1980
under the *Public Commercial Vehicles Act*

ITEM	COLUMN 1	COLUMN 2
1.	Transport new motor vehicle	subsection 1(3)
2.	Transport used furniture	subsection 1(6)
3.	Transport bulk commodities in tank vehicle	subsection 1(9)
4.	Improper use of number plate	subsection 8(1)
5.	Improper transfer of licence	subsection 8(2)
6.	Violation—fire extinguisher	section 11
7.	Underage driver	section 12
8.	Licensee—fail to keep accurate record	subsection 13(1)
9.	Driver—fail to keep accurate record	subsection 13(2)
10.	Fail to produce record	subsection 13(3)
11.	Fail to file certificate	section 16

R.R.O. 1980, Reg. 817, Sched. 31.

Schedule 32

Public Transportation and Highway Improvement Act

ITEM	COLUMN 1	COLUMN 2
1.	Use closed highway	subsection 28(5)
2.	Deface warning	subsection 28(5)
3.	Remove warning	subsection 28(5)
4.	Interfere with tree	subsection 30(2)
5.	Interfere with highway	clause 31(1)(a)
6.	Construct illegal access	clause 31(1)(b)
7.	Permit animal on highway	subsection 32(2)
8.	Have structure near highway	clause 32(2)(a)
9.	Place tree near highway	clause 34(2)(b)
10.	Display improper sign near highway	clause 34(2)(c)
11.	Have gathering place near highway	clause 34(2)(d)
12.	Authorize prohibited act	subsection 34(3)
13.	Fail to comply with notice	subsection 34(7)
14.	Have structure near controlled-access highway	clause 38(2)(a)
15.	Place tree near controlled-access highway	clause 38(2)(b)
16.	Conduct trade near controlled-access highway	clause 38(2)(c)
17.	Place power line near controlled-access highway	clause 38(2)(d)
18.	Display sign near controlled-access highway	clause 38(2)(e)
19.	Have gathering place near controlled-access highway	clause 38(2)(f)
20.	Improper access to controlled-access highway	clause 38(2)(g)
21.	Authorize prohibited act	subsection 38(3)

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ITEM	COLUMN 1	COLUMN 2
22.	Fail to comply with notice	subsection 38(8)
23.	Disobey notice	subsection 98(5)
24.	Use closed road	subsection 103(5)
25.	Remove barricade	subsection 103(5)
26.	Deface barricade	subsection 103(5)
27.	Remove a light	subsection 103(5)
28.	Remove a detour sign	subsection 103(5)
29.	Deface a detour sign	subsection 103(5)
30.	Remove a notice	subsection 103(5)
31.	Deface a notice	subsection 103(5)

O. Reg. 517/81, s. 1, *part.*

Schedule 33

Public Vehicles Act

ITEM	COLUMN 1	COLUMN 2
1.	No operating licence	clause 2(1)(a)
2.	Contravene operating licence	clause 2(1)(b)
3.	Arranging transportation	subsection 2(2)
4.	Discontinue service without notice	subsection 5(3)
5.	Fail to report discontinued service	clause 5(4)(a)
6.	Fail to give notice of discontinued service	clause 5(4)(b)
7.	Improper discontinuance notice	subsection 5(5)
8.	Operate unlicensed vehicle	section 12
9.	Contravene vehicle licence	subsection 15(1)
10.	No licence number	subsection 15(2)
11.	Licence number not plainly exposed	subsection 15(2)
12.	Improper toll charge	subsection 18(1)
13.	Drink on duty	section 20
14.	Smoking	section 21
15.	Refuse passage	section 22
16.	Permit clinging	subsection 23(1)
17.	Permit overcrowding of the driver	subsection 23(2)
18.	Permit improper placement of passenger	subsection 23(3)
19.	Have trailer	section 24
20.	Improper loading	section 25
21.	Improper exits	subsection 26(1)
22.	No insurance	section 27
23.	Fail to issue certificate of insurance	subsection 28(1)
24.	Fail to notify of cancellation of insurance	subsection 28(3)

O. Reg. 517/81, s. 1, *part.*

Schedule 34

Regulation 888 of Revised Regulations of Ontario, 1980
under the *Public Vehicles Act*

ITEM	COLUMN 1	COLUMN 2
1.	Improper use of number plate	section 6
2.	Fail to display licence	section 7
3.	Fail to file time-table	subsection 8(1)
4.	Fail to adhere to time-table	subsection 8(2)
5.	Violate time-table	subsection 8(3)

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ITEM	COLUMN 1	COLUMN 2
6.	Provide recurring service	subsection 9(2)
7.	No special licence	section 10
8.	Fail to report special trip	section 11
9.	Fail to display "chartered" sign	section 12
10.	Fail to produce report	section 12
11.	Operate outside authorized area	section 13
12.	Fail to deliver passengers	section 14
13.	Unqualified driver	section 16
14.	Unsafe vehicle	section 17
15.	Unsanitary vehicle	section 17
16.	Fail to keep exits free	section 18
17.	Fail to secure freight	section 18
18.	No speedometer	section 19
19.	No fire extinguisher	subsection 20(1)
20.	Inadequate fire extinguisher	subsection 20(1)
21.	Violation—fire extinguisher	subsection 20(2)
22.	Interior light violation	section 21
23.	Inadequate emergency equipment	clause 22(a)
24.	Inadequate spare equipment	clause 22(a)
25.	No axe	clause 22(b)
26.	Axe not readily accessible	clause 22(b)
27.	Improper push-out window	section 23
28.	Fail to keep records	section 25
29.	Fail to produce records	section 25
30.	Display advertising	section 26
31.	Fail to file certificate	section 27

R.R.O. 1980, Reg. 817, Sched. 34.

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Schedule 41

Regulation 455 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Load not properly confined	subsection 2(1)
2.	No covering on load	Subsection 2(1)

R.R.O. 1980, Reg. 817, Sched. 41.

Schedule 42

Regulation 483 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Licensee—fail to remove dump vehicle inspection sticker	clause 5(4)(b)
2.	Authorized person—fail to remove dump vehicle inspection sticker	clause 5(4)(b)
3.	Inspecting mechanic—fail to remove dump vehicle inspection sticker	clause 5(4)(b)
4.	Licensee—fail to properly affix current dump vehicle inspection sticker	clause 5(4)(b)

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ITEM	COLUMN 1	COLUMN 2
5.	Authorized person—fail to properly affix current dump vehicle inspection sticker	clause 5(4)(b)
6.	Inspecting mechanic—fail to properly affix current dump vehicle inspection sticker	clause 5(4)(b)
7.	Licensee—fail to remove school purposes vehicle safety inspection sticker	clause 6(3)(d)
8.	Authorized person—fail to remove school purposes vehicle safety inspection sticker	clause 6(3)(d)
9.	Inspecting mechanic—fail to remove school purposes vehicle safety inspection sticker	clause 6(3)(d)
10.	Licensee—fail to remove brake inspection sticker (school purposes vehicle)	clause 6(3)(d)
11.	Authorized person—fail to remove brake inspection sticker (school purposes vehicle)	clause 6(3)(d)
12.	Inspecting mechanic—fail to remove brake inspection sticker (school purposes vehicle)	clause 6(3)(d)
13.	Licensee—fail to remove bus safety inspection sticker	clause 7(6)(d)
14.	Authorized person—fail to remove bus safety inspection sticker	clause 7(6)(d)
15.	Inspecting mechanic—fail to remove bus safety inspection sticker	clause 7(6)(d)
16.	Licensee—fail to remove brake inspection sticker	clause 7(6)(d)
17.	Authorized person—fail to remove brake inspection sticker	clause 7(6)(d)
18.	Inspecting mechanic—fail to remove brake inspection sticker	clause 7(6)(d)

R.R.O. 1980, Reg. 817, Sched. 42.

Schedule 43

Regulation 462 of Revised Regulations of Ontario, 1980
under the *Highway Traffic Act*

ITEM	COLUMN 1	COLUMN 2
1.	Class L licence holder—unaccompanied by properly licenced driver	subsection 3(1)
2.	Class R licence holder—drive at unlawful hour	section 4
3.	Class R licence holder—carry passenger	section 4
4.	Class R licence holder—drive on prohibited highway	section 4
5.	Drive bus with unauthorized passengers	subsection 13(3)
6.	Temporary driver's licence holder—operate improper class of motor vehicle	subsection 15(1)
7.	Contravene licence condition—driving ability	section 16
8.	Fail to notify change of name—licence	section 19
9.	Fail to notify change of address—licence	section 19
10.	Licence holder—fail to sign driver's licence in ink	section 20

R.R.O. 1980, Reg. 817, Sched. 43.

Schedule 68

Off-Road Vehicles Act, 1983

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ITEM	COLUMN 1	COLUMN 2
ITEM	COLUMN 1	COLUMN 2
1.	Drive off-road vehicle—no permit	subsection 3(1)
2.	Drive off-road vehicle—no number plate	subsection 3(1)
3.	Drive off-road vehicle—permit number improperly displayed	subsection 3(1)
4.	Fail to surrender permit for off-road vehicle	subsection 3(2)
5.	Owner permit child under twelve to drive-off road vehicle	subsection 4(1)
6.	Make false statement	subsection 6(1)
7.	Fail to notify change of address	subsection 6(2)
8.	Fail to remove plate on ceasing to be owner	clause 8(1)(a)
9.	Fail to give vehicle portion of permit to new owner	clause 8(1)(b)
10.	Fail to retain plate portion of permit	clause 8(1)(c)
11.	Fail to apply for permit on becoming owner	subsection 8(2)
12.	Deface plate	clause 9(1)(a)
13.	Alter plate	clause 9(1)(a)
14.	Use defaced plate	clause 9(1)(b)
15.	Permit use of defaced plate	clause 9(1)(b)
16.	Use altered plate	clause 9(1)(b)
17.	Permit use of altered plate	clause 9(1)(b)
18.	Remove plate without authority	clause 9(1)(c)
19.	Use unauthorized plate	clause 9(1)(d)
20.	Permit use of unauthorized plate	clause 9(1)(d)
21.	Confuse identity of plate	clause 10(1)(a)
22.	Obstruct plate	clause 10(1)(b)
23.	Dirty plate	clause 10(1)(b)
24.	Drive off-road vehicle—no insurance	subsection 15(1)
25.	Permit off-road vehicle to be driven—no insurance	subsection 15(2)
26.	Fail to surrender evidence of insurance	subsection 15(3)
27.	Owner fail to surrender evidence of insurance within seventy-two hours	subsection 15(4)
28.	Produce false evidence of insurance	clause 15(6)(c)
29.	Owner produce false evidence of insurance	subsection 15(8)
30.	Careless driving	section 16
31.	Failure to stop when signalled	subsection 17(3)
32.	Fail to identify self	subsection 17(4)
33.	Fail to stop—flashing red light	subsection 18(1)
34.	Fail to wear proper helmet	subsection 19(1)

O. Reg. 65/85, s. 2.

REGULATION 818

under the Provincial Offences Act

**RULES OF PRACTICE AND PROCEDURE ON
APPEALS IN THE COURT OF APPEAL UNDER
THE PROVINCIAL OFFENCES ACT****1. In these rules,**

- (a) "Court" means the Court of Appeal;
- (b) "file" means file with or deliver to the Registrar;
- (c) "Registrar" means the Registrar of the Court. O. Reg. 472/80, r. 1.

2. These rules apply in respect of appeals to the Court under sections 114 and 122 of the Act. O. Reg. 472/80, r. 2.

3. The following apply to the calculation of a period of time prescribed by the Act, these rules or an order of the Court:

- 1. The time shall be calculated by excluding the first day and including the last day of the period.
- 2. Where a period of less than six days is prescribed, a Saturday or holiday shall not be reckoned.
- 3. Where the last day of the period of time falls on a Saturday or a holiday, the day next following that is not a Saturday or a holiday shall be deemed to be the last day of the period.
- 4. Where the days are expressed to be clear days or where the term "at least" is added, the time shall be calculated by excluding both the first day and the last day of the period. O. Reg. 472/80, r. 3.

4.—(1) A notice or document given or delivered by mail shall, unless the contrary is shown, be deemed to be given or delivered on the seventh day following the day on which it was mailed.

(2) Where, on motion without notice, a justice of appeal is satisfied that reasonable efforts have been made without success to give or deliver a notice or document in the manner required by these rules or the Act, or that reasonable efforts would not be successful, the justice of appeal by order may authorize substituted service of the notice or document in such manner as the justice of appeal directs or may dispense with the giving or delivery of the notice or document upon such terms as the justice of appeal considers proper in the circumstances. O. Reg. 472/80, r. 4.

5.—(1) Every notice or document,

(a) shall be printed, typewritten, written or reproduced legibly upon one side of good quality paper eleven inches by eight and one-half inches with a margin upon the left-hand side; and

(b) other than an affidavit, order or judgment, shall have a single space between lines and a triple space between paragraphs.

(2) An affidavit, order or judgment shall have a double space between lines. O. Reg. 472/80, r. 5.

6.—(1) An application for leave to appeal shall be commenced by filing and giving notice of motion.

(2) An application for leave to appeal shall be made returnable not later than ten days after the date on which the notice of motion is filed.

(3) An applicant for leave to appeal shall file and give notice of motion,

(a) where the defendant is the applicant,

(i) to the prosecutor,

(ii) if the prosecution is not acting on behalf of the Crown, to the Attorney General; and

(b) where the prosecutor is the applicant,

(i) to the defendant, and

(ii) if the prosecutor is not acting on behalf of the Crown, to the Attorney General,

within fifteen days after the date of the judgment sought to be appealed from.

(4) An application for leave to appeal shall be made returnable before a justice of appeal in chambers.

(5) A notice of motion referred to in subrule 1 shall set out clearly the special grounds upon which leave to appeal is sought and,

(a) any question of law upon which the appeal is sought to be founded; and

(b) where the appeal is as to sentence, the basis for the appeal.

(6) An applicant shall file in support of the application for leave to appeal,

(a) any transcript of the proceedings that is available, including a transcript of evidence at trial, reasons for judgment or sentence at trial and reasons for the judgment sought to be appealed from;

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(b) the proposed notice of appeal; and

(c) any report prepared under the authority of an order made during the course of the proceedings,

and may file any other material that is relevant to the application. O. Reg. 472/80, r. 6.

7.—(1) An applicant for leave to appeal who is in custody and who is not represented by counsel may deliver an application for leave to appeal in Form 406 to a senior official of the institution in which the applicant is held in custody.

(2) Rule 6 does not apply in respect of an applicant referred to in subrule (1) who commences an application for leave to appeal by delivery in accordance with subrule (1) within fifteen days after the date of the judgment sought to be appealed from.

(3) The Registrar shall transmit to the Attorney General a copy of an application for leave to appeal filed by an official of an institution referred to in subrule (1). O. Reg. 472/80, r. 7.

8.—(1) The Registrar, by a direction in writing,

(a) may set the time and date on which an application for leave to appeal filed in Form 406 is returnable;

(b) may change the date on which any application for leave to appeal is returnable; and

(c) may direct that any application for leave to appeal be returnable in court.

(2) The Registrar shall give notice of a direction under subrule (1) to each of the parties to the application. O. Reg. 472/80, r. 8.

9. A notice of appeal shall be in Form 401. O. Reg. 472/80, r. 9.

10.—(1) Appeal books shall be bound front and back in 130M weight cover stock.

(2) Appeal books, other than those prepared by the Attorney General, shall be bound in buff coloured cover stock.

(3) Appeal books prepared by the Attorney General shall be bound in grey cover stock.

(4) Every notice or document filed shall be endorsed with,

(a) the short style of cause;

(b) the nature of the notice or document;

(c) the name of the solicitor acting for the party on whose behalf the document is filed; and

(d) the court file number. O. Reg. 472/80, r. 10.

11.—(1) An appellant shall commence his appeal by filing and giving notice of appeal,

(a) where the defendant is the appellant,

(i) to the prosecutor, and

(ii) if the prosecutor is not acting on behalf of the Crown, to the Attorney General; and

(b) where the prosecutor is the appellant,

(i) to the defendant, and

(ii) if the prosecutor is not acting on behalf of the Crown, to the Attorney General.

(2) Subrule (1) does not apply to an appellant who is in custody, is not represented by counsel and commenced his application for leave to appeal by delivery of an application for leave to appeal in Form 406 in accordance with subrule 7 (1). O. Reg. 472/80, r. 11.

12. An appellant shall commence his appeal within seven days after the date of the order granting leave to appeal. O. Reg. 472/80, r. 12.

13.—(1) Not later than twenty days after filing notice of appeal, the appellant shall deliver to each other party to the appeal a document with a certificate in Form 402 endorsed thereon and containing a list of the exhibits and items of evidence that, in the opinion of the appellant, are not necessary for the proper disposition of the appeal.

(2) Not later than ten days after the document mentioned in subrule (1) is delivered to a party to the appeal, the party shall deliver to the appellant a document with a certificate in Form 402 endorsed thereon and containing a list of the exhibits and items of evidence that, in the opinion of the party, are not necessary for the proper disposition of the appeal and a list of the exhibits and items of evidence that, in the opinion of the party, are necessary for the proper disposition of the appeal.

(3) A party to whom a document mentioned in subrule (1) is delivered and who does not comply with subrule (2) shall be deemed to agree with the list contained in the document.

(4) The appellant is not required to provide a transcript of any evidence or to include in his appeal book any exhibits that all parties to the appeal have agreed is not necessary for the proper disposition of the appeal.

(5) The purpose of this rule is to minimize the reproduction of exhibits and the transcription of evidence as much as possible without affecting the proper disposition of an appeal.

(6) The appellant shall include in his appeal book the certificates in Form 402 made by the parties to the appeal.

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(7) Subrules (1) to (6) do not apply to a defendant, whether as appellant or respondent, who is in custody when the appeal is commenced. O. Reg. 472/80, r. 13.

14.—(1) The appellant shall file a certificate of the clerk of the provincial offences court in Form 403 not later than forty days after filing notice of appeal.

(2) An appellant who does not file a certificate of the clerk of the provincial offences court in Form 403 in accordance with subrule (1) or within such greater period of time as a justice of appeal may permit shall be deemed to have abandoned his appeal. O. Reg. 472/80, r. 14.

15.—(1) The appellant shall deliver copies of his appeal book and transcripts of evidence at trial including reasons for judgment or sentence as follows:

1. Three copies to the Registrar for the Court.
2. One copy to the respondent.
3. If the Attorney General is not the appellant or the respondent, one copy to the Attorney General.

(2) An appellant who does not deliver all copies of his appeal book and transcripts of evidence in accordance with subrule (1) shall be deemed to have abandoned his appeal. O. Reg. 472/80, r. 15.

16. The appellant shall include in the appeal book, in the order listed, the following:

1. An index.
2. A copy of the notice of appeal.
3. A copy of the information or the certificate of offence by which the proceedings were commenced.
4. A copy of the reasons for judgment or sentence at trial, if not included in the transcript of evidence at trial, and a copy of the reasons for judgment on the appeal under section 99 or 118 of the Act.
5. A copy of the order granting leave to appeal.
6. A copy of any other order made by a justice of appeal in respect of the appeal.
7. Copies of any exhibits at trial that are capable of reproduction and are material to the issues in appeal. O. Reg. 472/80, r. 16.

17.—(1) Where an application for leave to appeal has been filed, the Registrar shall deliver a copy of the notice of appeal to the clerk of the court appealed from and, upon receipt of the notice of appeal the clerk shall transmit the order appealed from and transmit all other material in his possession or control relevant to the proceedings to the Registrar to be kept with the records of the Court of Appeal.

(2) Currency, valuable securities, jewellery, narcotics and things inherently dangerous (such as explosives) shall not be transmitted to the Registrar under subrule (1) except under the authority of an order of a justice of appeal. O. Reg. 472/80, r. 17.

18.—(1) In the first complete week of each month except June and July the Registrar shall compile a list in two parts of all appeals pending before the Court of Appeal under the Act in which the transcript of evidence at trial including reasons for judgment or sentence and the reasons for judgment on the appeal under section 99 or 118 of the Act have been filed.

(2) The registrar shall include in Part I of the list the appeals referred to in subrule (1) that in his opinion can be heard in the first two weeks of sittings of the Court of Appeal in the following month. O. Reg. 472/80, r. 18.

19.—(1) The Registrar shall fix the date by which the appellant's statement of fact and law must be filed and shall enter the date in the notice in Form 404 for delivery to the appellant.

(2) The date fixed by the Registrar under subrule (1) must be at least ten days after the date of delivery to the appellant of the notice in Form 404.

(3) The Registrar shall include in Part II of the list the appeals referred to in subrule (1) that remain after compiling Part I of the list.

(4) The Registrar shall post the complete list in the Court of Appeal office as soon as it is compiled.

(5) At least three weeks before the first day of sittings in each month the Registrar shall deliver to each party to each appeal listed in Part I of the list compiled for the month,

- (a) a copy of Part I of the list; and
- (b) a notice in Form 404. O. Reg. 472/80, r. 19.

20.—(1) The appellant,

- (a) shall deliver a copy of his statement of fact and law,
 - (i) to the respondent, and
 - (ii) if the Attorney General is not appellant or respondent, to the Attorney General; and
- (b) shall file three copies of his statement of fact and law, not later than the date set out in the notice in Form 404 delivered by the Registrar.

(2) The respondent,

- (a) shall deliver a copy of his statement of fact and law,

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(i) to the appellant, and

(ii) if the Attorney General is not appellant or respondent, to the Attorney General; and

(b) shall file three copies of his statement of fact and law,

within seven days after the delivery of the appellant's statement of fact and law.

(3) When,

(a) the appellant does not deliver and file a statement of fact and law by the date set out in the notice in Form 404 delivered by the Registrar; or

(b) the respondent does not deliver and file a statement of fact and law within seven days after delivery of the appellant's statement of fact and law,

the parties to the appeal shall attend the supervising justice of appeal at 10 a.m. on the first Wednesday after the statement of fact and law was required to be filed. O. Reg. 472/80, r. 20.

21.—(1) The appellant and the respondent shall prepare their statements of fact and law in accordance with the following:

1. The statement of fact and law must be prepared in the form of numbered paragraphs.
2. The statement of fact and law must contain a concise statement of the points of fact and law to be presented.
3. Each point of fact or law must be accompanied by references to the transcript of evidence at trial and the authorities relied on.

(2) The respondent shall prepare his statement of fact and law in accordance with the following:

1. The statement of fact and law must state what portion of the appellant's statement of fact is accepted by the respondent as correct and what portion is disagreed with.
2. The statement of fact and law must contain a concise statement of any facts relied on by the respondent that are additional to those set out by the appellant.
3. The statement of fact and law must set out concisely the position of the respondent with respect to the points of law presented by the appellant and any additional points of law to be presented by the respondent. O. Reg. 472/80, r. 21.

22.—(1) An appellant who wishes to abandon his appeal may file a notice of abandonment.

(2) The appellant or counsel for the appellant shall sign the notice of abandonment.

(3) Where the appellant signs the notice of abandonment, the notice must be signed by another person who witnessed the signing by the appellant.

(4) Where the witness is not counsel for the appellant, the appellant shall file an affidavit of execution by the witness with the notice of abandonment.

(5) A notice of abandonment shall be in Form 405.

(6) The Registrar shall give a copy of the filed notice of abandonment to each of the other parties to the appeal. O. Reg. 472/80, r. 22.

23. The court may dismiss an appeal where the appellant,

- (a) does not attend in person or by counsel and has not indicated in the notice of appeal his intention not to be present in person or by counsel;
- (b) has not delivered and filed his statement of fact and law by the date set out in the notice in Form 404 delivered by the Registrar; or
- (c) has failed to comply with an order of the court in respect of the appeal. O. Reg. 472/80, r. 23.

24. The court shall not allow an appeal for the reason only that a respondent to the appeal,

- (a) is not present in person or by counsel at the hearing of the appeal;
- (b) has not delivered and filed his statement of fact and law within seven days after delivery of the appellant's statement of fact and law; or
- (c) has failed to comply with an order of the court in respect of the appeal,

but the court may proceed to hear the appeal notwithstanding that the respondent is not present in person or by counsel. O. Reg. 472/80, r. 24.

25. Immediately after the disposition of an appeal, the Registrar shall give notice of the decision of the court, including any written reasons and endorsements made by the court,

- (a) to each party to the appeal who was not present in person or by counsel when the decision was made; and
- (b) to the clerk of the court appealed from. O. Reg. 472/80, r. 25.

26.—(1) The following do not apply in respect of an applicant or appellant who is in custody, is not represented by counsel and commenced application for

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leave to appeal by delivery of an application in form 406:

1. Rules 12 to 16.
2. Rules 18 to 21.

(2) Where an application for leave to appeal is commenced by delivery of an application in Form 406, the Court may request the Attorney General to prepare an appeal book and deliver to the Registrar three copies for the Court and one copy for the appellant.

(3) An appeal book prepared in accordance with a request under subsection (2) shall include, in the order listed, the following:

1. An index.

2. A copy of any report made under the authority of an order made during the course of the proceedings.
3. A copy of the information or the certificate of offence by which the proceedings were commenced.
4. Where the appeal is or includes an appeal as to sentence, the pre-sentence report, if any, and the record of previous convictions, if any, of the applicant.
5. A copy of the reasons for judgment or sentence at trial and a copy of the reasons for judgment on the appeal under section 99 or 118 of the Act, if available. O. Reg. 472/80, r. 26.

Reg. 819

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REGULATION 819

under the Provincial Offences Act

RULES OF PRACTICE AND PROCEDURE ON
APPEALS IN THE COUNTY AND DISTRICT
COURTS AND THE PROVINCIAL COURTS
(CRIMINAL DIVISION) UNDER SECTION 99 OF
THE ACT

1. In these rules,

- (a) "clerk" means the clerk of the court to which an appeal is or may be taken under Part VI of the Act;
- (b) "Crown Attorney" means the Crown Attorney for the county or district in which the court has jurisdiction;
- (c) "file" means file with the clerk. O. Reg. 202/80, r. 1.

2. These rules apply in respect of appeals to the county or district courts or the provincial courts (criminal division) under section 99 of the Act. O. Reg. 202/80, r. 2.

3. These rules shall be constructed liberally so as to obtain as expeditious a conclusion of every proceeding as is consistent with a just determination of the proceeding. O. Reg. 202/80, r. 3.

4. The following apply to the calculation of a period of time prescribed by the Act, these rules or an order of a court:

- 1. The time shall be calculated by excluding the first day and including the last day of the period.
- 2. Where a period of less than six days is prescribed, a Saturday or holiday shall not be reckoned.
- 3. Where the last day of the period of time falls on a Saturday or a holiday, the day next following that is not a Saturday or a holiday shall be deemed to be the last day of the period.
- 4. Where the days are expressed to be clear days or where the term "at least" is added, the time shall be calculated by excluding both the first day and the last day of the period. O. Reg. 202/80, r. 4.

5. A notice or document given or delivered by mail shall, unless the contrary is shown, be deemed to be given or delivered on the seventh day following the day on which it was mailed. O. Reg. 202/80, r. 5.

6. Where, on motion without notice, a judge is satisfied that reasonable efforts have been made without success to give or deliver a notice or document in the manner required by these rules or the Act, or that rea-

sonable efforts would not be successful, the judge by order may authorize substituted service of the notice or document in such manner as the judge directs or may dispense with the giving or delivery of the notice or document upon such terms as the judge considers proper in the circumstances. O. Reg. 202/80, r. 6.

7. A notice of appeal shall be in Form 301. O. Reg. 202/80, r. 7.

8. An appellant shall file and give notice of appeal,

- (a) where the defendant is the appellant,
 - (i) to the prosecutor, and
 - (ii) if the prosecutor is not acting on behalf of the Crown, to the Crown Attorney; and
- (b) where the prosecutor is the appellant,
 - (i) to the defendant, and
 - (ii) if the prosecutor is not acting on behalf of the Crown, to the Crown Attorney,

within thirty days after the date of the decision appealed from. O. Reg. 202/80, r. 8.

9.—(1) An appellant shall file proof of giving notice of appeal within ten days after the last day for service of notice of appeal.

(2) Proof of giving notice of appeal may be made by affidavit.

(3) Where admission of giving notice of appeal is endorsed on the notice, proof need not be made by affidavit. O. Reg. 202/80, r. 9.

10. An appellant shall file with notice of appeal a certificate of the clerk of provincial offences court in Form 302. O. Reg. 202/80, r. 10.

11. A defendant who appeals from a decision imposing a fine shall file with the notice of appeal a receipt for payment of the fine issued by the clerk of the court that imposed the fine unless the clerk is satisfied that an order has been made under subsection 94 (2) of the Act and a recognizance has been entered into by the defendant in accordance with the order. O. Reg. 202/80, r. 11.

12.—(1) A recognizance under section 93 of the Act shall be in Form 303.

(2) A recognizance under section 94 of the Act shall be in Form 304. O. Reg. 202/80, r. 12.

13.—(1) An application provided for by the Act or these rules shall be commenced by notice of motion.

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(2) There shall be at least three days between the giving of notice of motion and the day for hearing the application.

(3) An applicant shall file notice of motion at least two days before the day for hearing the application.

(4) Evidence on an application may be given,

(a) by affidavit;

(b) with the permission of the court, orally; or

(c) in the form of a transcript of the examination of a witness.

(5) Upon the hearing of an application and whether or not other evidence is given on the application, the justice may receive and base his decision upon information he considers credible or trustworthy in the circumstances.

(6) An application may be heard without notice,

(a) on consent; or

(b) where the application is made under section 94 or 95 of the Act; or

(c) where, having regard to the subject-matter or the circumstances of the application, it would not be unjust to hear the application without notice. O. Reg. 202/80, r. 13.

14.—(1) Where a provisional legal aid certificate limited to the filing of notice of appeal and applying for release from custody has been issued under the *Legal Aid Act* to an appellant, the appellant is not required to file a certificate of clerk of provincial offences court referred to in rule 10 until one month after filing notice of appeal.

(2) An appellant referred to in subrule (1) who does not file a certificate of clerk of provincial offences court referred to in rule 10 within one month after filing notice of appeal or within such greater period of time as a judge may permit shall be deemed to have abandoned his appeal. O. Reg. 202/80, r. 14.

15.—(1) The clerk of the appeal court shall send a copy of the notice of appeal to the clerk of the provincial offences court appealed from as the notice required by section 98 of the Act.

(2) The clerk of the provincial offences court shall transmit the order appealed from and transmit or transfer custody of the other material referred to in section 98 of the Act to the clerk of the appeal court within ten days after receiving the copy of the notice of appeal from the clerk of the appeal court. O. Reg. 202/80, r. 15.

16.—(1) An appellant shall file one copy of the transcript of evidence at trial, including reasons for judgment or sentence if any, and shall deliver one copy to the respondent.

(2) Where the Crown Attorney has given notice of intervention after receiving notice of appeal, the appellant shall deliver a copy of the transcript of evidence at trial, including reasons for judgment or sentence if any, to the Crown Attorney. O. Reg. 202/80, r. 16.

17. Where a prosecutor is not acting on behalf of the Crown, the Crown Attorney may intervene to act on behalf of the prosecutor or to attend as a party on the appeal. O. Reg. 202/80, r. 17.

18.—(1) As soon as ten days have elapsed after,

(a) the clerk has received from the clerk of the provincial offences court the order appealed from and the other material referred to in section 98 of the Act,

(b) the appellant has filed a copy of the transcript of evidence at trial, including reasons for judgment or sentence if any; and

(c) any other step required by the Act, these rules or the court has been completed,

the clerk shall place the appeal on an appeal list for the next sitting of the court at which dates are fixed for hearing appeals.

(2) The clerk shall give at least fourteen days notice of the sitting referred to in subrule (1) to the appellant and the respondent and, where the Crown Attorney has filed notice of intervention, to the Crown Attorney.

(3) Where an application is made under section 110 of the Act for an order that an appeal be heard and determined by way of a new trial in the court, the clerk shall not place the appeal on an appeal list under subrule (1) until the application has been disposed of and ten days have elapsed since the disposition of the application. O. Reg. 202/80, r. 18.

19. A party to an appeal may apply to the court at any time for directions with respect to the perfection of the appeal. O. Reg. 202/80, r. 19.

20. An applicant for an order under section 110 of the Act that an appeal be heard and determined by way of a new trial in the court shall give at least seven days notice of the application to all other parties to the appeal. O. Reg. 202/80, r. 20.

21. Unless a judge otherwise orders, a party to an appeal who intends to be present either personally or by counsel at the hearing of the appeal shall not file a statement of facts and law. O. Reg. 202/80, r. 21.

22. An appellant who intends not to be present in person or by counsel at the hearing of the appeal,

(a) except where he has indicated his intention in the notice of appeal, shall file notice in writing of his intention; and

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- (b) shall file a statement in writing of the issues and his arguments on the appeal,

prior to the date fixed for the hearing. O. Reg. 202/80, r. 22.

23. The court may dismiss an appeal where the appellant,

- (a) does not attend in person or by counsel and,
 - (i) has not indicated in the notice of appeal his intention not to be present in person or by counsel at the hearing of the appeal,
 - (ii) has not filed notice in writing of intention not to be present in person or by counsel at the hearing of the appeal, and
 - (iii) has not filed a statement in writing of the issues and his arguments on the appeal;
- (b) has filed notice of abandonment;
- (c) has not filed a transcript of evidence at trial, including reasons for judgment or sentence if any, within thirty days after receiving notice of completion of the transcription from the clerk of the provincial offences court appealed from;
- (d) after obtaining an order under subclause 100 (1) (b) (ii) of the Act for the examination of a witness, has not filed a transcript of the examination within thirty days after receiving notice of completion of the transcription from the other person before whom the witness was examined; or
- (e) has failed to comply with an order of the court in respect of the appeal. O. Reg. 202/80, r. 23.

24. The court shall not allow an appeal for the reasons only that a respondent to the appeal,

- (a) is not present in person or by counsel at the hearing of the appeal;
- (b) after obtaining an order under subclause 100 (1) (b) (ii) of the Act for the examination of a witness, has not filed a transcript of the examination within thirty days after receiving notice of completion of the transcription from the judge, officer, justice of the peace or other person before whom the witness was examined; or
- (c) has failed to comply with an order of the court in respect of the appeal,

but the court may proceed to hear the appeal notwithstanding that the respondent is not present in person or by counsel. O. Reg. 202/80, r. 24.

25.—(1) An appellant who wishes to abandon his appeal may file a notice of abandonment.

(2) The appellant or counsel for the appellant shall sign the notice of abandonment.

(3) Where the appellant signs the notice of abandonment, the notice must be signed by another person who witnessed the signing by the appellant.

(4) Where the witness is not counsel for the appellant, the appellant shall file an affidavit of execution by the witness with the notice of abandonment.

(5) A notice of abandonment shall be in Form 305.

(6) The clerk shall give a copy of the filed notice of abandonment to each of the other parties to the appeal. O. Reg. 202/80, r. 25.

26.—(1) An appeal under section 136 of the Act in respect of release from custody shall be commenced by written notice filed and given to all other parties and, if the Crown Attorney is not a party, to the Crown Attorney.

(2) On an appeal under section 136 of the Act, the court shall order that the defendant be released from custody pending trial if the court is satisfied that the defendant will attend in court for trial.

(3) In an order under subrule (2) for the release of the defendant from custody pending trial, the court shall provide that the order shall not take effect until the defendant,

- (a) gives an undertaking, either without conditions or with such conditions as may be ordered by the court, to attend in court for trial; or
- (b) enters into a recognizance with or without sureties but in such amount, with such conditions and before such justice as the court orders,
 - (i) without deposit of money or other valuable security, or
 - (ii) and deposits with the justice the money or other valuable security specified by the court. O. Reg. 202/80, r. 26.

27.—(1) In this rule, "order" means an order under subclause 100 (1) (b) (ii) of the Act.

(2) Except with the consent of the parties or their counsel, the examination of a witness under an order shall take place in the presence of the parties to the appeal or their counsel.

(3) A party who intends to apply for an order for the examination of a witness before a special examiner shall obtain a tentative appointment with the special examiner for the examination before applying for the order.

PROVINCIAL OFFENCES

Reg. 819

(4) Upon the completion of an examination before a special examiner under an order, the applicant for the order shall file a certificate of the special examiner in Form 306.

(5) A special examiner who signs and delivers a certificate in Form 306 shall notify each of the parties to the appeal and the clerk when the transcript of the examination is completed. O. Reg. 202/80, r. 27.

28.—(1) Where the court makes an order under clause 100 (1) (c) of the Act referring a question to a special commissioner for inquiry and report, the court shall, by order, appoint the special commissioner and fix the date on or before which the inquiry shall be completed and the report shall be filed.

(2) A special commissioner appointed by order of the court may apply to the court for directions in respect of the inquiry or the report or both.

(3) Upon completion of the report, the special commissioner,

(a) shall file the report together with one copy for each party to the appeal; and

(b) shall give notice of the filing of the report to each party to the appeal. O. Reg. 202/80, r. 28.

29. Immediately after the disposition of an appeal, the clerk shall give notice of the decision of the court, including any written reasons and endorsements made by the court,

(a) to each party to the appeal who was not present in person or by counsel when the decision was made; and

(b) to the clerk of the provincial offences court appealed from. O. Reg. 202/80, r. 29.

Reg. 820

PROVINCIAL OFFENCES

REGULATION 820

under the Provincial Offences Act

**RULES OF PRACTICE AND PROCEDURE ON
APPEALS IN THE PROVINCIAL COURTS
(CRIMINAL DIVISION) UNDER SECTION 118
OF THE ACT**

1.—(1) In these rules,

- (a) "appeal court" means the provincial court (criminal division) to which the appeal is taken;
- (b) "clerk" means the clerk of the provincial court (criminal division) to which the appeal is taken.

(2) Where an appeal is taken by a defendant or a prosecutor, the other of them is the respondent. O. Reg. 201/80, r. 1.

2. These rules apply in respect of appeals to the provincial courts (criminal division) under section 118 of the Act. O. Reg. 201/80, r. 2.

3. These rules shall be construed liberally so as to obtain as expeditious a conclusion of every proceeding as is consistent with a just determination of the proceeding. O. Reg. 201/80, r. 3.

4. The following apply to the calculation of a period of time prescribed by the Act, these rules or an order of a court:

1. The time shall be calculated by excluding the first day and including the last day of the period.
2. Where a period is less than six days is prescribed, a Saturday or holiday shall not be reckoned.
3. Where the last day of the period of time falls on a Saturday or a holiday, the day next following that is not a Saturday or a holiday shall be deemed to be the last day of the period.
4. Where the days are expressed to be clear days or where the term "at least" is added, the time shall be calculated by excluding both the first day and the last day of the period. O. Reg. 201/80, r. 4.

5. A notice or document given or delivered by mail shall, unless the contrary is shown, be deemed to be given or delivered on the seventh day following the day on which it was mailed. O. Reg. 201/80, r. 5.

6. Where, on motion without notice, a judge is satisfied that reasonable efforts have been made without success to give or deliver a notice or document in the manner required by these rules or the Act, or that reasonable efforts would not be successful, the judge by

order may authorize substituted service of the notice or document in such manner as the judge directs or may dispense with the giving or delivery of the notice or document upon such terms as the judge considers proper in the circumstances. O. Reg. 201/80, r. 6.

7. A notice of appeal shall be in Form 201. O. Reg. 201/80, r. 7.

8. A defendant who appeals from a decision imposing a fine shall file with the notice of appeal a receipt for payment of the fine issued by the clerk of the court that imposed the fine unless the clerk is satisfied that an order has been made under subsection 94 (2) of the Act and a recognizance has been entered into by the defendant in accordance with the order. O. Reg. 201/80, r. 8.

9.—(1) Upon the filing of a notice of appeal, the clerk shall set a day and time for hearing in accordance with section 119 of the Act.

(2) A notice of the time and place of the hearing of an appeal shall be in Form 202.

(3) The clerk shall give to the respondent a copy of the filed notice of appeal with the notice of the time and place of the hearing.

(4) Notice of the time and place of the hearing shall be given at least seven days before the day set for the hearing.

(5) A certificate of giving a notice under subrule (3) endorsed on the notice by the clerk shall be received in evidence and, in the absence of evidence to the contrary, is proof of the giving stated in the certificate. O. Reg. 201/80, r. 9.

10. The clerk shall give to the Crown Attorney for the county or district in which the appeal court is located a copy of each notice or document filed with or issued by the clerk in respect of an appeal to which these rules apply. O. Reg. 201/80, r. 10.

11. Where a notice of appeal has been filed, the clerk of the provincial offences court shall transfer the order appealed from and all other material in his possession or control relevant to the proceedings to be kept with the records of the appeal court. O. Reg. 201/80, r. 11.

12.—(1) A recognizance under section 93 of the Act shall be in Form 203.

(2) A recognizance under section 94 of the Act shall be in Form 204. O. Reg. 201/80, r. 12.

13.—(1) An application provided for by the Act or these rules shall be commenced by notice of motion.

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Reg. 820

(2) There shall be at least three days between the giving of notice of motion and the day for hearing the application.

(3) An applicant shall file notice of motion at least two days before the day for hearing the application.

(4) Evidence on an application may be given,

(a) by affidavit;

(b) with the permission of the court, orally; or

(c) in the form of a transcript of the examination of a witness.

(5) Upon the hearing of an application and whether or not other evidence is given on the application, the judge may receive and base his decision upon information he considers credible or trustworthy in the circumstances.

(6) An application may be heard without notice,

(a) on consent;

(b) where the application is made under section 94 or 95 of the Act; or

(c) where, having regard to the subject-matter or the circumstances of the application, it would not be unjust to hear the application without notice. O. Reg. 201/80, r. 13.

14.—(1) An appellant who wishes to abandon his appeal shall file with the clerk a notice of abandonment.

(2) The appellant or counsel for the appellant shall sign the notice of abandonment.

(3) Where the appellant signs the notice of abandonment, the notice must be signed by another person who witnessed the signing by the appellant.

(4) Where the witness is not counsel for the appel-

lant, the appellant shall file an affidavit of execution by the witness with the notice of abandonment.

(5) A notice of abandonment shall be in Form 205.

(6) The clerk shall give a copy of the filed notice of abandonment to the respondent. O. Reg. 201/80, r. 14.

15.—(1) The appeal court may dismiss an appeal where,

(a) the appellant fails to appear in person or by counsel on the day set by the clerk for the hearing of an appeal;

(b) the appeal court finds that the appellant has failed to comply with an order made by the appeal court in respect of the appeal; or

(c) the appellant has filed notice of abandonment with the clerk.

(2) The appeal court shall not allow an appeal for the reason only that a respondent to the appeal,

(a) is not present in person or by counsel on the day set by the clerk for the hearing of the appeal; or

(b) is found by the appeal court to have failed to comply with an order made by the appeal court in respect of the appeal,

but may proceed to hear the appeal notwithstanding that the respondent is not present in person or by counsel. O. Reg. 201/80, r. 15.

16. Immediately after the disposition of an appeal, the clerk shall give notice of the decision of the appeal court, including any written reasons or endorsements made by the court,

(a) to each party to the appeal who was not present when the decision was made; and

(b) to the clerk of the provincial offences court appealed from. O. Reg. 201/80, r. 16.

CHAPTER 446

Regulations Act**1.—(1)** In this Act,

Interpretation

- (a) “file” means file in the manner prescribed in section 2;
- (b) “Minister” means the member of the Executive Council to whom the administration of this Act is assigned by the Lieutenant Governor in Council;
- (c) “Registrar” means the Registrar of Regulations;
- (d) “regulation” means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include,
 - (i) a by-law of a municipality or local board as defined in the *Municipal Affairs Act*,
R.S.O. 1980, c. 303
 - (ii) a regulation made under *The Broker-Dealers Act, 1947*, the *Teaching Profession Act*, section 78 of the *Cemeteries Act* or by an authority under section 30 of the *Conservations Authorities Act*, or a by-law of a hospital made under the *Public Hospitals Act*, or the constitution and by-laws of an association made under the *Agricultural Associations Act*,
1947, c. 8
R.S.O. 1980, c. 495, 59, 85, 410, 8
 - (iii) an order of the Ontario Municipal Board, other than an order prescribing the rules governing proceedings before the Board,
 - (iv) an order, direction or designation of the Lieutenant Governor in Council under section 7, 29, 40, 41, 42, 44 or 65 of the *Public Transportation and Highway Improvement Act* or a designation by the Minister of Transportation
R.S.O. 1980, c. 421

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Sec. 1 (1)

and Communications under section 43 or 91 of that Act,

(v) a schedule of classifications for civil servants, including qualifications, duties and salaries prescribed under the *Public Service Act*, or

R.S.O. 1980,
c. 418

(vi) an order, approval, regulation, prescription, direction or instruction of the Minister of Intergovernmental Affairs or the Ministry of Intergovernmental Affairs that the Minister or the Ministry is empowered to give or make under the *Municipal Act* or under the *Municipal Affairs Act*, except clause 6 (b) thereof. R.S.O. 1970, c. 410, s. 1; 1971, c. 61, s. 1; 1972, c. 1, ss. 1, 100 (2), 104 (6); 1972, c. 3, s. 17.

R.S.O. 1980,
cc. 302, 303

Filing
required

2.—(1) Every regulation shall be filed in duplicate with the Registrar together with a certificate in duplicate of its making signed by the authority making it or a responsible officer thereof and, where approval is required, with a certificate of approval in duplicate signed by the authority so approving or by a responsible officer thereof, except that in the case of a regulation made by a minister that does not require approval, no certificate is required.

Copy from
Executive
Council

(2) Where a regulation is made or approved by the Lieutenant Governor in Council, the filing with the Registrar of two copies of it certified to be true copies by the Clerk of the Executive Council shall be deemed to be compliance with subsection (1). R.S.O. 1970, c. 410, s. 2.

Commence-
ment

3. Unless otherwise stated in it, a regulation comes into force and has effect on and after the day upon which it is filed. R.S.O. 1970, c. 410, s. 3.

Failure
to file

4. Except where otherwise provided, a regulation that is not filed has no effect. R.S.O. 1970, c. 410, s. 4.

Publication

5.—(1) Every regulation shall be published in *The Ontario Gazette* within one month of its filing.

Extension
of time for
publication

(2) The Minister may at any time by order extend the time for publication of a regulation and the order shall be published with the regulation.

Effect of
non-
publication

(3) A regulation that is not published is not effective against a person who has not had actual notice of it.

Sec. 7 (3)

REGULATIONS

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(4) Publication of a regulation,

Effect of
publication

- (a) is *prima facie* proof of its text and of its making, its approval where required, and its filing; and
- (b) shall be deemed to be notice of its contents to every person subject to it or affected by it,

and judicial notice shall be taken of it, of its contents and of its publication. R.S.O. 1970, c. 410, s. 5.

6. The Minister may,

Powers of
Minister

- (a) determine whether a regulation, rule, order or by-law is a regulation within the meaning of this Act and his decision is final;
- (b) determine who shall be deemed responsible officers within the meaning of section 2; and
- (c) determine any matter that may arise in connection with the administration of this Act. R.S.O. 1970, c. 410, s. 6.

7.—(1) There shall be a Registrar of Regulations appointed by the Lieutenant Governor in Council who,

Registrar

- (a) is responsible for the numbering and indexing of all regulations filed in his office and for their publication; and
- (b) shall exercise such powers and perform such duties as are vested in or imposed upon him by this Act, the regulations made hereunder, or the Minister.

(2) The Registrar may issue a certificate as to the filing of a regulation and every such certificate is *prima facie* proof of the facts stated in it without any proof of appointment or signature.

Certificate
of Registrar

(3) Where a map or plan,

Filing of
maps or
plans

- (a) forms part of a regulation for the purpose of illustrating a description of land; and
- (b) is identified in the regulation by a number given to it by the Registrar,

and the regulation states that the map or plan is filed in the office of the Registrar, he may in his discretion file the map or

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REGULATIONS

Sec. 7 (3)

plan in his office in numerical order and no publication of the map or plan is necessary. R.S.O. 1970, c. 410, s. 7.

Numbering

8. Regulations shall be numbered in the order in which they are filed, and a new series shall be commenced each year. R.S.O. 1970, c. 410, s. 8.

Citation

9. A regulation may be cited or referred to as "Ontario Regulation" or "O. Reg." followed by its filing number, a virgule and the last two figures of the year of its filing. R.S.O. 1970, c. 410, s. 9.

Regulations

10.—(1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing the powers and duties of the Registrar;
- (b) prescribing the form, arrangement and scheme of regulations;
- (c) prescribing a system of indexing;
- (d) providing for the preparation and publication of a consolidation or codification of regulations that have been filed, and for the preparation and publication of supplements thereto;
- (e) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

Consolidation,
condification

(2) Publication of a regulation in a consolidation or codification or supplement thereto mentioned in clause (1) (d) shall be deemed publication within the meaning of this Act. R.S.O. 1970, c. 410, s. 10.

Defects not
corrected

11. The filing or publication of a regulation under this Act does not have the effect of validating or correcting any such regulation that is otherwise invalid or defective in any respect or for any reason. R.S.O. 1970, c. 410, s. 11.

Standing
Committee
on
Regulations

12.—(1) At the commencement of each session of the Legislature a standing committee of the Assembly shall be appointed, to be known as the Standing Committee on Regulations, with authority to sit during the session.

Regulations
referred

(2) Every regulation stands permanently referred to the Standing Committee on Regulations for the purposes of subsection (3).

Sec. 12 (5)

REGULATIONS

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(3) The Standing Committee on Regulations shall examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations or enabling statutes, and shall deal with such other matters as are referred to it from time to time by the Assembly.

Terms of
reference

(4) The Standing Committee on Regulations may examine any member of the Executive Council or any public servant designated by any such member respecting any regulation made under an Act that is under his administration.

Authority
to call
persons

(5) The Standing Committee on Regulations shall, from time to time, report to the Assembly its observations, opinions and recommendations. R.S.O. 1970, c. 410, s. 12.

Report

Statutory Instruments Act

1970-71-72, Chap. 38; proclaimed in force January 1, 1972
Amended 1974-75, c. 20, s. 24; in force December 20, 1974
Amended 1976-77, c. 28, s. 42; in force June 29, 1977
Amended 1980-81-82-83, c. 111, Sch. IV, ss. 6 and 7;
proclaimed in force July 1, 1983
Amended 1983-84, c. 40, s. 64; in force June 29, 1984
Amended 1985, c. 26, s. 107;
proclaimed in force August 13, 1985

An Act to provide for the examination, publication and scrutiny of regulations and other statutory instruments

[Assented to 19th May, 1971]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

- 1.** This Act may be cited as the *Statutory Instruments Act*. Short title

INTERPRETATION

- 2.**—(1) In this Act, Definitions
- (a) “prescribed” means prescribed by regulations made pursuant to this Act; “Prescribed”
- (b) “regulation” means a statutory instrument “Regulation”
- (i) made in the exercise of a legislative power conferred by or under an Act of Parliament, or
- (ii) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before

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a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;

“Regulation-making authority”

- (c) “regulation-making authority” means any authority authorized to make regulations and, with reference to any particular regulation or proposed regulation, means the authority that made or proposes to make the regulation; and

“Statutory instrument”

- (d) “statutory instrument” means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

- (i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which such instrument relates, or

- (ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament,

but does not include

- (iii) any such instrument issued, made or established by a corporation incorporated by or under an Act of Parliament unless

(A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, or

(B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

- (iv) any such instrument issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regu-

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lation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament,

- (v) any such instrument in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto, or
- (vi) an ordinance of the Yukon Territory or the Northwest Territories or any instrument issued, made or established thereunder.

(2) In applying paragraph (b) of subsection (1) for the purpose of determining whether or not an instrument described in subparagraph (iii) of paragraph (d) of that subsection is a regulation, such instrument shall be deemed to be a statutory instrument, and any instrument accordingly determined to be a regulation shall be deemed to be a regulation for all purposes of this Act.

Determination of whether certain instruments are regulations

EXAMINATION OF PROPOSED REGULATIONS

3.—(1) Where a regulation-making authority proposes to make a regulation it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.

Proposed regulations to be forwarded

(2) Upon receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

Examination

- (a) it is authorized by the statute pursuant to which it is to be made;
- (b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;
- (c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and

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- (d) the form and draftsmanship of the proposed regulation are in accordance with established standards. 1985, c. 26, s. 107.

Advise
regulation-
making
authority

(3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (a), (b), (c) or (d) of that subsection to which, in the opinion of the Deputy Minister of Justice, based on such examination, the attention of the regulation-making authority should be drawn.

Application

(4) Subsection (1) does not apply to any proposed regulation or class of regulation that, pursuant to paragraph (a) of section 27, is exempted from the application of that subsection, and paragraph (d) of subsection (2) does not apply to any proposed rule, order or regulation governing the practice or procedure in any proceedings before the Supreme Court of Canada, the Federal Court of Canada or the Court Martial Appeal Court of Canada. 1983-84, c. 40, s. 64.

Doubt as to
nature of
proposed
statutory
instrument

4. Where any regulation-making authority or other authority responsible for the issue, making or establishment of a statutory instrument, or any person acting on behalf of such an authority, is uncertain as to whether or not a proposed statutory instrument would be a regulation if it were issued, made or established by such authority, it or he shall cause a copy of the proposed statutory instrument to be forwarded to the Deputy Minister of Justice who shall determine whether or not the instrument would be a regulation if it were so issued, made or established.

TRANSMISSION AND REGISTRATION

Transmission
of regulations
to Clerk of
Privy Council

5.—(1) Every regulation-making authority shall, within seven days after making a regulation or, in the case of a regulation made in the first instance in one only of its official language versions, within seven days after its making in that version, transmit copies of the regulation in both official languages to the Clerk of the Privy Council for registration pursuant to section 6.

Copies to be
certified

(2) One copy of each of the official language versions of each regulation that is transmitted to the Clerk of the Privy Council pursuant to subsection (1), other than a regulation made or approved by the Governor in Council, shall be certified by the regulation-making authority to be a true copy thereof.

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(3) Subsection (1) does not apply to any regulation of a class that, pursuant to paragraph (b) of section 27, is exempted from the application of that subsection. Application

6. Subject to subsection (1) of section 7, the Clerk of the Privy Council shall register Registration of statutory instruments

- (a) every regulation transmitted to him pursuant to subsection (1) of section 5;
- (b) every statutory instrument, other than a regulation, that is required by or under any Act of Parliament to be published in the *Canada Gazette* and is so published; and
- (c) every statutory instrument or other document that, pursuant to any regulation made under paragraph (g) of section 27, is directed or authorized by the Clerk of the Privy Council to be published in the *Canada Gazette*.

7.—(1) Where any statutory instrument is transmitted or forwarded to the Clerk of the Privy Council for registration under this Act, the Clerk of the Privy Council may refuse to register the instrument if Refusal to register

- (a) he is not advised that the instrument was, before it was issued, made or established, determined by the Deputy Minister of Justice pursuant to section 4 to be one that would, if it were issued, made or established, not be a regulation; and
- (b) in his opinion, the instrument was, before it was issued, made or established, a proposed regulation to which subsection (1) of section 3 applied and was not examined in accordance with subsection (2) of that section.

(2) Where the Clerk of the Privy Council refuses to register any statutory instrument for the reasons referred to in subsection (1), he shall forward a copy of the instrument to the Deputy Minister of Justice who shall determine whether or not it is a regulation. Determination by Deputy Minister of Justice

POWER TO REVOKE REGULATIONS

8. No regulation is invalid by reason only that it was not examined in accordance with subsection (2) of section 3, but where any statutory instrument that was issued, made or established without having been so examined Revocation of regulations by Governor in Council

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- (a) was, before it was issued, made or established, determined by the Deputy Minister of Justice pursuant to section 4 to be one that would, if it were issued, made or established, be a regulation, or
- (b) has, since its issue, making or establishment, been determined by the Deputy Minister of Justice pursuant to section 7 to be a regulation,

the Governor in Council, on the recommendation of the Minister of Justice, may, notwithstanding the provisions of the Act by or under the authority of which the instrument was or purports to have been issued, made or established, revoke the instrument in whole or in part and thereupon cause the regulation-making authority or other authority by which it was issued, made or established to be notified in writing of his action.

COMING INTO FORCE OF REGULATIONS

Coming into
force

9.—(1) No regulation shall come into force on a day earlier than the day on which it is registered unless

- (a) it expressly states that it comes into force on a day earlier than that day and is registered within seven days after it is made, or
- (b) it is a regulation of a class that, pursuant to paragraph (b) of section 27, is exempted from the application of subsection (1) of section 5,

in which case it shall come into force, except as otherwise authorized or provided by or under the Act pursuant to which it is made, on the day on which it is made or on such later day as may be stated in the regulation.

Where
regulation
comes into
force before
registration

(2) Where a regulation is expressed to come into force on a day earlier than the day on which it is registered, the regulation-making authority shall advise the Clerk of the Privy Council in writing of the reasons why it is not practical for the regulation to come into force on the day on which it is registered.

PUBLICATION IN CANADA GAZETTE

Official
gazette of
Canada

10. The Queen's Printer shall continue to publish the *Canada Gazette* as the official gazette of Canada.

Regulations
to be
published in
*Canada
Gazette*

11.—(1) Subject to any regulations made pursuant to paragraph (c) of section 27, every regulation shall be published in

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the *Canada Gazette* within twenty-three days after copies thereof in both official languages are registered pursuant to section 6.

(2) No regulation is invalid by reason only that it was not published in the *Canada Gazette*, but no person shall be convicted of an offence consisting of a contravention of any regulation that at the time of the alleged contravention was not published in the *Canada Gazette* in both official languages unless

Conviction
under
unpublished
regulation

- (a) the regulation was exempted from the application of subsection (1) pursuant to paragraph (c) of section 27, or the regulation expressly provides that it shall apply according to its terms before it is published in the *Canada Gazette*, and
- (b) it is proved that at the date of the alleged contravention reasonable steps had been taken to bring the purport of the regulation to the notice of those persons likely to be affected by it.

12. Notwithstanding anything in this Act, the Governor in Council may by regulation direct that any statutory instrument or other document, or any class thereof, be published in the *Canada Gazette* and the Clerk of the Privy Council, where authorized by regulations made by the Governor in Council, may direct or authorize the publication in the *Canada Gazette* of any statutory instrument or other document, the publication of which, in his opinion, is in the public interest.

Power to
direct or
authorize
publication in
*Canada
Gazette*

DISTRIBUTION OF CANADA GAZETTE

13.—(1) A copy of each regulation that is published in the *Canada Gazette* shall be provided to each member of the Senate and House of Commons by delivering to each such member without charge a copy of the *Canada Gazette* in which the regulation is published.

Distribution
of *Canada
Gazette* to
Members of
Parliament

(2) Copies of the *Canada Gazette* shall be delivered without charge to such persons or classes of persons, in addition to those described in subsection (1), as may be prescribed and may be sold to any person upon payment of the charge prescribed therefor.

Distribution
of *Canada
Gazette* to
public

INDEXES

14.—(1) The Clerk of the Privy Council shall prepare and the Queen's Printer shall publish quarterly a consolidated index of all regulations and amendments to regulations in

Quarterly
consolidated
index of
regulations

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force at any time after the end of the preceding calendar year, other than any regulation that is exempted from the application of subsection (1) of section 11 as a regulation described in subparagraph (iii) of paragraph (c) of section 27.

Quarterly
index of
documents
other than
regulations

(2) The Queen's Printer shall prepare and publish a quarterly index of all documents, other than regulations, that have been published in the *Canada Gazette* during the three-month period immediately preceding the month in which the index is published.

15. Repealed; 1974-75, c. 20, s. 24.

16. Repealed; 1974-75, c. 20, s. 24.

17. Repealed; 1974-75, c. 20, s. 24.

18. Repealed; 1974-75, c. 20, s. 24.

19. Repealed; 1974-75, c. 20, s. 24.

20. Repealed; 1974-75, c. 20, s. 24.

21. Repealed; 1974-75, c. 20, s. 24.

Power to
request
revision or
consolidation

22.—(1) Where the Clerk of the Privy Council, after consultation with the Deputy Minister of Justice, is of the opinion that any particular regulations should be revised or consolidated, he may request the regulation-making authority or any person acting on behalf of such authority to prepare a revision or consolidation of these regulations.

Failure to
comply with
request

(2) Where any authority or person referred to in subsection (1) fails to comply within a reasonable time with a request made pursuant to that subsection, the Governor in Council may, by order, direct that authority or person to comply with the request within such period of time as he may specify in the order.

JUDICIAL NOTICE OF STATUTORY INSTRUMENTS

Judicial
notice

23.—(1) A statutory instrument that has been published in the *Canada Gazette* shall be judicially noticed.

Evidence

(2) In addition to any other manner of proving the existence or contents of a statutory instrument, evidence of the existence or contents of a statutory instrument may be given by the production of a copy of the *Canada Gazette* purporting to contain the text of the statutory instrument.

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(3) For the purposes of this section, where a regulation is included in a copy of a consolidation of regulations purporting to be printed by the Queen's Printer, that regulation shall be deemed to have been published in the *Canada Gazette*.

Deemed
publication in
*Canada
Gazette*

RIGHT OF ACCESS TO STATUTORY INSTRUMENTS

24. Subject to any other Act of Parliament and to any regulations made pursuant to paragraph (d) of section 27, any person may, upon payment of the fee prescribed therefor, inspect

Inspection of
statutory
instruments

- (a) any statutory instrument that has been registered by the Clerk of the Privy Council, by attending at the office of the Clerk of the Privy Council or at such other place as may be designated by him and requesting that the statutory instrument be produced for inspection; or
- (b) any statutory instrument that has not been registered by the Clerk of the Privy Council, by attending at the head or central office of the authority that made the statutory instrument or at such other place as may be designated by such authority and requesting that the statutory instrument be produced for inspection.

25. Subject to any other Act of Parliament and to any regulations made pursuant to paragraph (d) of section 27, any person may, upon payment of the fee prescribed therefor, obtain copies of

Copies of
statutory
instruments

- (a) any statutory instrument that has been registered by the Clerk of the Privy Council, by writing to the Clerk of the Privy Council or by attending at the office of the Clerk of the Privy Council or at such other place as may be designated by him, and requesting that a copy of the statutory instrument be provided; or
- (b) any statutory instrument that has not been registered by the Clerk of the Privy Council, by writing to the authority that made the statutory instrument or by attending at the head or central office of the authority or at such other place as may be designated by such authority, and requesting that a copy of the statutory instrument be provided.

SCRUTINY BY PARLIAMENT OF STATUTORY INSTRUMENTS

Statutory
instruments
referred to
Scrutiny
Committee

26. Every statutory instrument issued, made or established after the coming into force of this Act, other than an instrument the inspection of which and the obtaining of copies of which are precluded by any regulations made pursuant to paragraph (d) of section 27, shall stand permanently referred to any Committee of the House of Commons, of the Senate or of both Houses of Parliament that may be established for the purpose of reviewing and scrutinizing statutory instruments.

REGULATIONS

Regulations

27. The Governor in Council may make regulations,

- (a) exempting any proposed regulation or class of regulation from the application of subsection (1) of section 3 where that regulation or class of regulation would, if it were made, be exempted from the application of subsection (1) of section 5 or from the application of subsection (1) of section 11 as a regulation or class of regulation described in subparagraph (ii) of paragraph (c);
- (b) exempting any class of regulation from the application of subsection (1) of section 5 where, in the opinion of the Governor in Council, the registration thereof is not reasonably practicable due to the number of regulations of that class;
- (c) subject to any other Act of the Parliament of Canada, exempting from the application of subsection (1) of section 11
 - (i) any class of regulation that is exempted from the application of subsection (1) of section 5,
 - (ii) any regulation or class of regulation where the Governor in Council is satisfied that the regulation or class of regulation affects or is likely to affect only a limited number of persons and that reasonable steps have been or will be taken for the purpose of bringing the purport thereof to the notice of those persons affected or likely to be affected by it, or
 - (iii) any regulation or class of regulation where the Governor in Council is satisfied that the regulation or class of regulation is such that publi-

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cation could reasonably be expected to be injurious to

- (A) the conduct by the Government of Canada of federal-provincial affairs, or
 - (B) the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, as defined in subsection 15 (2) of the *Access to Information Act*, or the detection, prevention or suppression of subversive or hostile activities, as defined in subsection 15 (2) of the *Access to Information Act*; 1980-81-82-83, c. 111, sch. IV, s. 6;
- (d) precluding the inspection of and the obtaining of copies of
- (i) any regulation or class of regulation that has been exempted from the application of subsection (1) of section 11 as a regulation described in sub-paragraph (iii) of paragraph (c),
 - (ii) any statutory instrument or class of statutory instrument other than a regulation, where the Governor in Council is satisfied that the inspection thereof and the obtaining of copies thereof could reasonably be expected to be injurious to
 - (A) the conduct by the Government of Canada of federal-provincial affairs, or
 - (B) the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, as defined in subsection 15 (2) of the *Access to Information Act*, or the detection, prevention or suppression of subversive or hostile activities, as defined in subsection 15 (2) of the *Access to Information Act*, or
 - (iii) any statutory instrument or class of statutory instrument the inspection of which or the making of copies of which is not otherwise provided for by law, in respect of which the Governor in Council is satisfied that the inspection or making of copies thereof as pro-

vided for by this Act would, if it were not precluded by any regulation made under this section, result or be likely to result in injustice or undue hardship to any person or body affected thereby or in serious and unwarranted detriment to any such person or body in the matter or conduct of his or its affairs; 1980-81-82-83, c. 111, sch. IV, s. 7;

- (e) prescribing the manner in which a regulation-making authority shall transmit copies of a regulation to the Clerk of the Privy Council;
- (f) prescribing the form and manner in which any statutory instrument shall be registered and the form and manner in which and the period of time for which records of any statutory instrument shall be maintained;
- (g) authorizing the Clerk of the Privy Council to direct or authorize publication in the *Canada Gazette* of any statutory instrument or other document, the publication of which, in the opinion of the Clerk of the Privy Council, is in the public interest;
- (h) respecting the form and manner in which the *Canada Gazette* shall be published and prescribing the classes of documents that may be published therein;
- (i) requiring any regulation-making authority to forward to the Clerk of the Privy Council such information relating to any regulations made by it that are exempted from the application of subsection (1) of section 11 as will enable the Clerk of the Privy Council to carry out the obligation imposed upon him by subsection (1) of section 14;
- (j) respecting the form and manner in which any index of statutory instruments or any consolidation of regulations shall be prepared and published;
- (k) prescribing the persons or classes of persons to whom copies of any consolidation of regulations may be delivered without charge and prescribing the charge that shall be paid by any other person for a copy of any such consolidation;
- (l) prescribing the fee that shall be paid by any person for any inspection of a statutory instrument or for

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obtaining a copy thereof or the manner in which any such fee shall be determined; and

- (m) prescribing any matter or thing that by this Act is to be prescribed.

AMENDMENTS TO INTERPRETATION ACT

28.—(1) Subsection (2) of section 6 of the *Interpretation Act* is repealed and the following substituted therefor:

“(2) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force

When no
date fixed

- (a) in the case of an Act, upon the expiration of the day immediately before the day the Act was enacted;
- (b) in the case of a regulation of a class that is not exempted from the application of subsection (1) of section 5 of the *Statutory Instruments Act*, upon the expiration of the day immediately before the day the regulation was registered pursuant to section 6 of that Act; and
- (c) in the case of a regulation of a class that is exempted from the application of subsection (1) of section 5 of the *Statutory Instruments Act*, upon the expiration of the day immediately before the day the regulation was made.”

(2) Subsection (2) of section 23 of the said Act is repealed and the following substituted therefor:

“(2) Words directing or empowering a Minister of the Crown to do an act or thing, or otherwise applying to him by his name of office, include a Minister acting for him, or, if the office is vacant, a Minister designated to act in the office by or under the authority of an order in council, and also his successors in the office, and his or their deputy, but nothing in this subsection shall be construed to authorize a deputy to exercise any authority conferred upon a Minister to make a regulation as defined in the *Statutory Instruments Act*.”

Powers of
acting
Minister,
successor or
deputy

(3) The said Act is further amended by adding thereto, immediately after section 28 thereof, the following section:

28a.—(1) In every Act,

Affirmative
and negative
resolutions

- (a) the expression “subject to affirmative resolution of Parliament”, when used in relation to any regulation, means that such regulation shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and shall not come into force unless and until it is affirmed by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses;
- (b) the expression “subject to affirmative resolution of the House of Commons”, when used in relation to any regulation, means that such regulation shall be laid before the House of Commons within fifteen days after it is made or, if the House is not then sitting, on any of the first fifteen days next thereafter that the House is sitting and shall not come into force unless and until it is affirmed by a resolution of the House of Commons introduced and passed in accordance with the rules of that House;
- (c) the expression “subject to negative resolution of Parliament”, when used in relation to any regulation, means that such regulation shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and may be annulled by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses; and
- (d) the expression “subject to negative resolution of the House of Commons”, when used in relation to any regulation, means that such regulation shall be laid before the House of Commons within fifteen days after it is made or, if the House is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and may be annulled by a resolution of the House of Commons introduced and passed in accordance with the rules of that House.

Effect of
negative
resolution

(2) Where a regulation is annulled by a resolution of Parliament or of the House of Commons, as the case may be, it shall be deemed to have been revoked on the day the resolution is passed and any law that was revoked or amended by the making of that regulation shall be deemed to be revived on the day the resolution is passed but the validity of any action taken or not taken in compliance with a regulation so

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deemed to have been revoked shall not be affected by the resolution.”

CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

29. Section 3 of the *Canadian Bill of Rights* is repealed 1960, c. 44
and the following substituted therefor:

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.”

Duties of
Minister of
Justice

30. Section 41 of the *Defence Production Act* is repealed 1955, c. 52
and the following substituted therefor: [27; D-2]

41.—(1) Every regulation, as defined in the *Statutory Instruments Act*, made under the authority of this Act shall be published in the *Canada Gazette* within thirty days after it is made.

Regulations
to be
published

(2) Where a regulation has been published in the *Canada Gazette* pursuant to subsection (1), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within seven days of the day the regulation was published or, if Parliament is not then sitting, on any of the first seven days next thereafter that Parliament is sitting, praying that the regulation be revoked or amended, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.”

Motion to
revoke or
amend

31. All that portion of section 5 of the *Export and Import Permits Act* following paragraph (c) thereof is repealed and the following substituted therefor: 1953—54,
c. 27

“and where any goods are included in the list for the purpose of ensuring supply or distribution of goods subject to allocation by intergovernmental arrangement or for the purpose of implementing an intergovernmental arrangement or commitment, a statement of the effect or a summary of the arrangement or commitment, if it has not previously been laid before Parliament, shall be laid before Parliament not later than fifteen days after the Order of

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the Governor in Council including those goods in the list is published in the *Canada Gazette* pursuant to the *Statutory Instruments Act* or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.”

TRANSITIONAL

Deemed
revocation of
regulations

32. Where a regulation or an amendment thereto has not been published in the *Canada Gazette* and is of such a class that, if it were made after the coming into force of this Act, it would not be exempted pursuant to paragraph (c) of section 27 from the application of subsection (1) of section 11, it shall be deemed to be revoked on a day twelve months after the day on which this Act comes into force unless before that day it is transmitted to the Clerk of the Privy Council in both official languages, in which case the Clerk of the Privy Council shall, notwithstanding subsection (1) of section 7, register the regulation forthwith.

REVISED STATUTES OF CANADA, 1970

Interpretation

33.—(1) In this section,

“Old law”

(a) “old law” means the statutes in force prior to the coming into force of the Revised Statutes of Canada, 1970 that are repealed and replaced by the Revised Statutes of Canada, 1970; and

“New law”

(b) “new law” means the Revised Statutes of Canada, 1970.

Application
to new law

(2) The amendments made by this Act to or in terms of the old law shall be deemed to have been made correspondingly to or in terms of the new law, effective on the day the new law comes into force or the day this Act comes into force, whichever is the later day; and, without limiting the powers of the Statute Revision Commission under *An Act respecting the Revised Statutes of Canada*, the Statute Revision Commission shall, in selecting Acts for inclusion in the supplement to the consolidation referred to in section 3 of that Act, include therein the amendments so made by this Act in the form in which those amendments are deemed by this section to have been made.

Idem

(3) A reference in this Act to any Act that is repealed and replaced by the Revised Statutes of Canada, 1970, or to any provision of such an Act, shall, after the coming into force of those Revised Statutes, be read as regards any transaction,

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matter or thing subsequent thereto as a reference to the corresponding Act or provision included in those Revised Statutes.

REPEAL

34. The *Regulations Act*, chapter 235 of the Revised Statutes of Canada, 1952 is repealed. ^{Repeal}

COMMENCEMENT

35. This Act shall come into force on a day to be fixed by proclamation. ^{Coming into force}

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Trespass to Property Act**1.—(1)** In this Act,

Interpretation

(a) “occupier” includes,

- (i) a person who is in physical possession of premises, or
- (ii) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises,

notwithstanding that there is more than one occupier of the same premises;

(b) “premises” means lands and structures, on either of them, and includes,

- (i) water,
- (ii) ships and vessels,
- (iii) trailers and portable structures designed or used for residence, business or shelter,
- (iv) trains, railway cars, vehicles and aircraft, except while in operation.

(2) A school board has all the rights and duties of an occupier in respect of its school sites as defined in the *Education Act*. 1980, c. 15, s. 1.

School boards
R.S.O. 1980.
c. 129

2.—(1) Every person who is not acting under a right or authority conferred by law and who,

Trespass an
offence

(a) without the express permission of the occupier, the proof of which rests on the defendant,

- (i) enters on premises when entry is prohibited under this Act, or

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(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(b) does not leave the premises immediately after he is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than \$1,000.

Colour of right as a defence

(2) It is a defence to a charge under subsection (1) in respect of premises that is land that the person charged reasonably believed that he had title to or an interest in the land that entitled him to do the act complained of. 1980, c. 15, s. 2.

Prohibition of entry

3.—(1) Entry on premises may be prohibited by notice to that effect and entry is prohibited without any notice on premises,

(a) that is a garden, field or other land that is under cultivation, including a lawn, orchard, vineyard and premises on which trees have been planted and have not attained an average height of more than two metres and woodlots on land used primarily for agricultural purposes; or

(b) that is enclosed in a manner that indicates the occupier's intention to keep persons off the premises or to keep animals on the premises.

Implied permission to use approach to door

(2) There is a presumption that access for lawful purposes to the door of a building on premises by a means apparently provided and used for the purpose of access is not prohibited. 1980, c. 15, s. 3.

Limited permission

4.—(1) Where notice is given that one or more particular activities are permitted, all other activities and entry for the purpose are prohibited and any additional notice that entry is prohibited or a particular activity is prohibited on the same premises shall be construed to be for greater certainty only.

Limited prohibition

(2) Where entry on premises is not prohibited under section 3 or by notice that one or more particular activities are permitted under subsection (1), and notice is given that a particular activity is prohibited, that activity and entry for the purpose is prohibited and all other activities and entry for the purpose are not prohibited. 1980, c. 15, s. 4.

Method of giving notice

5.—(1) A notice under this Act may be given,

Sec. 9 (1)

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- (a) orally or in writing;
 - (b) by means of signs posted so that a sign is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies; or
 - (c) by means of the marking system set out in section 7.
- (2) Substantial compliance with clause (1) (b) or (c) is sufficient notice. 1980, c. 15, s. 5. Substantial compliance
- 6.**—(1) A sign naming an activity or showing a graphic representation of an activity is sufficient for the purpose of giving notice that the activity is permitted. Form of sign
- (2) A sign naming an activity with an oblique line drawn through the name or showing a graphic representation of an activity with an oblique line drawn through the representation is sufficient for the purpose of giving notice that the activity is prohibited. 1980, c. 15, s. 6. Idem
- 7.**—(1) Red markings made and posted in accordance with subsections (3) and (4) are sufficient for the purpose of giving notice that entry on the premises is prohibited. Red markings
- (2) Yellow markings made and posted in accordance with subsections (3) and (4) are sufficient for the purpose of giving notice that entry is prohibited except for the purpose of certain activities and shall be deemed to be notice of the activities permitted. Yellow markings
- (3) A marking under this section shall be of such a size that a circle ten centimetres in diameter can be contained wholly within it. Size
- (4) Markings under this section shall be so placed that a marking is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies. 1980, c. 15, s. 7. Posting
- 8.** A notice or permission under this Act may be given in respect of any part of the premises of an occupier. 1980, c. 15, s. 8. Notice applicable to part of premises
- 9.**—(1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he believes on reasonable and probable grounds to be on the premises in contravention of section 2. Arrest without warrant on premises

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Delivery to
police officer

(2) Where the person who makes an arrest under subsection (1) is not a police officer, he shall promptly call for the assistance of a police officer and give the person arrested into the custody of the police officer.

Application
of
R.S.O. 1980,
c. 460

(3) A police officer to whom the custody of a person is given under subsection (2) shall be deemed to have arrested the person for the purposes of the provisions of the *Provincial Offences Act* applying to his release or continued detention and bail. 1980, c. 15, s. 9.

Arrest
without
warrant off
premises

10. Where a police officer believes on reasonable and probable grounds that a person has been in contravention of section 2 and has made fresh departure from the premises, and the person refuses to give his name and address, or there are reasonable and probable grounds to believe that the name or address given is false, the police officer may arrest the person without warrant. 1980, c. 15, s. 10.

Motor
vehicles
R.S.O. 1980,
c.198

11. Where an offence under this Act is committed by means of a motor vehicle, as defined in the *Highway Traffic Act*, the driver of the motor vehicle is liable to the fine provided under this Act and, where the driver is not the owner, the owner of the motor vehicle is liable to the fine provided under this Act unless the driver is convicted of the offence or, at the time the offence was committed, the motor vehicle was in the possession of a person other than the owner without the owner's consent. 1980, c. 15, s. 11.

Damage
award

12.—(1) Where a person is convicted of an offence under section 2, and a person has suffered damage caused by the person convicted during the commission of the offence, the court shall, on the request of the prosecutor and with the consent of the person who suffered the damage, determine the damages and shall make a judgment for damages against the person convicted in favour of the person who suffered the damage, but no judgment shall be for an amount in excess of \$1,000.

Costs of
prosecution

(2) Where a prosecution under section 2 is conducted by a private prosecutor, and the defendant is convicted, unless the court is of the opinion that the prosecution was not necessary for the protection of the occupier or his interests, the court shall determine the actual costs reasonably incurred in conducting the prosecution and, notwithstanding section 61 of the *Provincial Offences Act*, shall order those costs to be paid by the defendant to the prosecutor.

Sec. 12 (6)

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(3) A judgment for damages under subsection (1), or an award of costs under subsection (2), shall be in addition to any fine that is imposed under this Act.

Damages and costs in addition to fine

(4) A judgment for damages under subsection (1) extinguishes the right of the person in whose favour the judgment is made to bring a civil action for damages against the person convicted arising out of the same facts.

Civil action

(5) The failure to request or refusal to grant a judgment for damages under subsection (1) does not affect a right to bring a civil action for damages arising out of the same facts.

Idem

(6) The judgment for damages under subsection (1), and the award for costs under subsection (2), may be filed in a small claims court and shall be deemed to be a judgment or order of that court for the purposes of enforcement. 1980, c. 15, s. 12.

Enforcement

